No. 89-474-CSX
Status: GRANTED

Title: William V. Grady, District Attorney of Dutchess County, Petitioner,
v.
Thomas J. Corbin

Docketed:
September 11, 1989

Court: Court of Appeals of New York

Counsel for petitioner: Grady,William B.

Counsel for respondent: Greller,Stephen L., Green,Andrea, Farrell,Richard T.

Entry	Date	Note	Proceedings and Orders
1	Sep 11 1989	G	Petition for writ of certiorari filed.
5	Oct 16 1989		Waiver of right of respondent Hon. Judith Hillery to respo filed.
3	Oct 18 1989		DISTRIBUTED. November 3, 1989
2	Oct 20 1989	X	Brief of respondent Thomas J. Corbin in opposition filed.
6	Nov 6 1989		Petition GRANTED.
			**********
7	Dec 14 1989		Record filed.
		*	Certified copy of original record, box, received.
8	Dec 15 1989		Joint appendix filed.
9	Dec 21 1989		Brief of petitioner William V. Grady filed.
11	Jan 3 1990		Order extending time to file brief of respondent on the merits until January 30, 1990.
12	Jan 26 1990		SET FOR ARGUMENT WEDNESDAY, MARCH 21, 1990. (2ND CASE)
13	Jan 30 1990		Brief of respondent Thomas J. Corbin filed.
14	Feb 15 1990		CIRCULATED.
15	Mar 2 1990	X	Reply brief of petitioner William V. Grady filed.
16	Mar 21 1990		ARGUED.

No. 89-474

IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM V. GRADY, District Attorney of Dutchess County,
Petitioner,

against

THOMAS J. CORBIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petition for a Writ of Certiorari

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(3309)

Question Presented

Whether, within the constraints of the double jeopardy clause of the Fifth Amendment, a motorist who causes the death of another person as the result of an automobile collision can be subject to prosecution for homicide, notwithstanding the fact that at the scene of the collision, and prior to the other operator's death, respondent received uniform traffic tickets for Driving While Intoxicated and Failure to Keep to the Right and subsequently entered guilty pleas to those accusatory instruments and was sentenced.

Parties

In the New York State Court of Appeals and the Appellate Division, Second Judicial Department the parties were Thomas J. Corbin and Judith A. Hillery, as Judge of the County Court, Dutchess County and William V. Grady, as District Attorney of Dutchess County. Judith A. Hillery, Judge of the County Court, who was represented by the New York State Attorney General, elected not to appear in either proceeding. In the County Court of Dutchess County the only parties were the People of the State of New York, represented by William V. Grady, District Attorney of Dutchess County and Thomas J. Corbin.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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Petitioner,

against

THOMAS J. CORBIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petition for a Writ of Certiorari

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court:

The District Attorney of Dutchess County, on behalf of the People of the State of New York, petitions for a writ of certiorari to review the Order of the New York State Court of Appeals in this case.

Opinions Below

The opinion of the New York Court of Appeals is set forth at Appendix pages 1a through 16a *infra*, and is unreported. The Order of the Appellate Division, Second Judicial Department dismissing an application to prohibit prosecution is set forth at Appendix pages 1b through 2b *infra*, and is unreported. The opinion of the County Court Judge denying respondent's motion to dismiss the Indictment is set forth at Appendix pages 1c through 11c *infra*, and is unreported.

Jurisdiction

The Order of the New York Court of Appeals was entered on July 13, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

Constitutional and Statutory Provisions Involved

The Fifth Amendment of the United States Constitution provides, in pertinent part:

> . . . [N]or shall any person be subject for the same offense to be twice placed in jeopardy of life or limb. . . .

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> . . . [N]or shall any state deprive any person of life, liberty or property, without due process of law. . . .

New York State Vehicle and Traffic Law Section 1800(d) provides:

> A conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle or motor cycle.

New York State Vehicle and Traffic Law Section 1120(a) provides in pertinent part:

> Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway. . . .

New York State Vehicle and Traffic Law Section 1192 provides in pertinent part:

> 2. No person shall operate a motor vehicle while he has .10 of 1 percentum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.
>
> 3. No person shall operate a motor vehicle while he is in an intoxicated condition.

New York Penal Law Section 125.15 which defines Manslaughter in the Second Degree provides in pertinent part:

> A person is guilty of manslaughter in the second degree when:
>
> 1. He recklessly causes the death of another person. . . .

New York State Penal Law Section 125.12 which defines Vehicular Manslaughter in the Second Degree provides in pertinent part:

> A person is guilty of vehicular manslaughter in the second degree when he:
>
> (1) commits the crime of criminally negligent homicide as defined in section 125.10, and
>
> (2) causes the death of such other person by operation of a vehicle in violation of subdivision two, three or four of section eleven hundred ninety-two of the vehicle and traffic law.

New York State Penal Law Section 125.10 which defines Criminally Negligent Homicide provides in pertinent part:

> A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

New York State Penal Law Section 120.00 which defines Assault in the Third Degree provides in pertinent part:

> A person is guilty of assault in the third degree when:
>
> . . .
>
> 2. He recklessly causes physical injury to another person.

Statement of the Case

At approximately 6:35 p.m. on October 3, 1987, while respondent was operating a motor vehicle in a westbound lane on a state highway, he drove his vehicle into the eastbound lane of traffic and struck the rear view mirror of a vehicle. He then continued into the eastbound lane striking a second vehicle operated by Brenda Dirago and occupied by Daniel Dirago. At the time of the impact there was a moderate to heavy rainfall; the respondent was traveling at forty-five (45) miles per hour and respondent's vehicle was nine (9) feet into the eastbound lane and there was an overlap of approximately two (2) feet between the left front of the Dirago vehicle and the left front of respondent's vehicle. That evening the respondent was issued two uniform traffic tickets accusing him of Driving While Intoxicated (New York State Vehicle and Traffic Law Section 1192(3)) and Failure to Keep Right (New York State Vehicle and Traffic Law Section 1120(a)). After the respondent's arrest, an Assistant District Attorney was called to the scene by the police to prepare a search warrant for the seizure of a sample of respondent's blood, if necessary. No search warrant was prepared because shortly after his arrest the respondent consented to taking a blood test for the purposes of determining the level of alcohol in his

blood. The Assistant District Attorney then left the scene. Later that evening Mrs. Dirago died as a result of injuries sustained in the automobile collision.

The uniform traffic tickets issued on the night of October 3, 1987, were returnable in the local criminal court on October 29, 1987. However, that Court later advanced the return date to October 27, 1987. On October 27th the respondent and counsel appeared before the local criminal court and respondent entered pleas of guilty to the two offenses charged in the uniform tickets. At the time the Court accepted the pleas the Judge was not aware that the case involved an automobile accident or a death. Since no prosecutor was present at the time the guilty pleas were entered, and no prosecutor had been scheduled to appear that night, the Court adjourned the matter for sentencing until November 17, 1987. On November 17th, the respondent was sentenced to the usual sentence imposed on a first-time Driving While Intoxicated offender, *i.e.*, a Three Hundred Fifty Dollar ($350.00) fine, a conditional discharge to attend the New York State Vehicle and Traffic Law Article 21 School, the respondent's license was suspended and he was given a twenty (20) day conditional license. At the time of sentencing neither the Assistant District Attorney who was present in the courtroom nor the Court knew that the case involved a fatal automobile collision.

In the meantime, on October 30, 1987, the District Attorney had received the results of respondent's October 3rd blood test which indicated that respondent had a blood alcohol level of .19 percent.

In early January 1988 the District Attorney received the report of an accident reconstructionist, which had been commissioned in early October 1987. A Grand Jury was then impanelled and an Indictment dated January 19, 1988, was returned accusing respondent Corbin of one count of Manslaughter in the Second Degree (in violation of New York State Penal Law Section 125.15); two counts of Vehicular Manslaughter in the Second Degree (in violation of New York State Penal Law Section 125.12, Subdivisions 1 and 2); one count of Criminally Negligent Homicide (in violation of New York State Penal Law Section 125.10); one count of Assault in the Third Degree (in violation of New York State Penal Law Section 120.00, Subdivision 2); one count of Operating a Motor Vehicle While Under the Influence of Alcohol (in violation of New York State Vehicle and Traffic Law Section 1192, Subdivision 2) and one count of Operating a Motor Vehicle While Under the Influence of Alcohol (in violation of New York State Vehicle and Traffic Law Section 1192, Subdivision 3).

In the County Court the respondent sought dismissal of the Indictment in part on the ground that prosecution under the Indictment was barred by his prior pleas of guilty to Driving While Intoxicated and Failure to Keep Right. After a hearing, the County Court denied the motion.

The respondent then commenced a proceeding pursuant to New York State Civil Practice Law and Rules Article 78 in the nature on prohibition seeking to prevent the County Court and the District Attorney from proceeding with his prosecution on the ground that such prosecution was barred

by the double jeopardy provisions of the United States Constitution. The Appellate Division dismissed the proceeding. The respondent then appealed to the New York State Court of Appeals. That Court reversed the Order of the Appellate Division. The majority of the Judges concluded that the double jeopardy principles of the Federal Constitution precluded prosecution under this Indictment. Speaking for the two dissenting Judges, Chief Judge Wachtler stated:

> It devalues the double jeopardy clause of the Fifth Amendment of the Federal Constitution when a defendant, unquestionably intoxicated at the time his auto struck and killed a person, avoids a homicide prosecution by actively misleading a justice of the peace into believing that no accident occurred, and no one was killed.

(14a *infra.*)

Reasons for Granting the Writ

This case presents a substantial issue of the application of former jeopardy principles under the Fifth Amendment of the United States Constitution on which there is significant disparity among the federal and state courts. This Court has long recognized that:

> . . . Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). *Accord, Illinois v. Vitale*, 447 U.S. 410, 416, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980); *Brown v. Ohio*, 432 U.S. 161, 166, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); *Iannelli v. United States*, 420 U.S. 770, 785 N.17, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975). Here, respondent appeared before a local criminal court judge and entered pleas of guilty to Driving While Intoxicated in violation of Section 1192, Subdivision 3 of the New York State Vehicle and Traffic Law, *i.e.*, "No person shall operate a motor vehicle while he is in an intoxicated condition." The second purported guilty plea was to Failing to Keep to the Right in violation of New York State Vehicle and Traffic Law Section 1120(a) which provides: "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway. . . ." Under the *Blockburger* test, Manslaughter in the Second Degree, as charged in the first count of the Indictment is not the same offense. It involves recklessly causing a death. Clearly, the Driving While Intoxicated statute requires proof that the defendant was intoxicated; that is not a statutory element of the crime of Manslaughter in the Second Degree under New York law.

On the other hand, Manslaughter in the Second Degree requires proof of a death whereas Driving While Intoxicated and Failure to Keep Right do not. Therefore, under traditional double jeopardy analysis, the prosecution for Manslaughter should be permitted. Under the second count of the Indictment respondent was charged with Vehicular Manslaughter in the Second Degree; more specifically he was accused of violating New York Penal Law Section 125.12, Subdivisions 1 and 2 in that with criminal negligence he caused the death of Brenda Dirago by operating a motor vehicle on a public highway while he had more than .10 of 1 percentum by weight of alcohol in his blood. Since respondent's prosecution in the local criminal court involved Common Law Driving While Intoxicated rather than driving with more than .10 of 1 percentum by weight of alcohol in his blood, this count of Vehicular Manslaughter in the Second Degree contains an element which was not part of the statutory crime of Driving While Intoxicated or Failure to Keep Right which was contained in the original uniform traffic ticket. Under the fourth count of the Indictment respondent is accused of Criminally Negligent Homicide. That prosecution should also be permitted since Criminally Negligent Homicide under New York law is committed when with criminal negligence a person causes the death of another person. Acting with criminal negligence and causing the death of another person are not elements of New York Common Law Driving While Intoxicated or Failure to Keep Right. Finally, the fifth count of the Indictment accused respondent of Reckless Assault in the Third Degree involving injuries to Daniel Dirago. Prosecution under that count should be permitted since recklessly causing physical injury to a third person is not an element of Common Law Driving While Intoxicated or Failure to Keep Right. Therefore, under traditional double jeopardy principles, the prosecution should be permitted to proceed under the first, second, fourth and fifth counts of the Indictment.

The majority of the New York State Court of Appeals ruled that traditional double jeopardy principles under the *Blockburger* test are no longer controlling because in *Illinois v. Vitale, supra,* this Court modified the *Blockburger* test. Other courts have also found that *Vitale* modified *Blockburger. E.g., State v. Lonergan,* 16 *Conn. App.* 358, 548 A. 2d 718 (1988), appeal granted 210 Conn. 812, 556 A. 2d 611 (1989); *Ex Parte Peterson,* 738 S.W. 2d 688 (Tex. Cr. App. 1987); *State v. Dively,* 92 N.J. 573, 458 A. 2d 502 (1983). However, conflicting opinions are held by other courts which have found that *Vitale* does not modify *Blockburger. E.g., United States v. Brooklier,* 637 F. 2d 620, 623-24 (Ninth Circuit, 1980), *cert. denied,* 450 U.S. 980, 101 S. Ct. 1514, 64 L. Ed. 2d 815 (1981); *State v. Seats,* 131 Ariz. 89, 638 P. 2d 1335 (1981) (En Banc); *People v. Jackson,* 118 Ill. 2d 179, 514 N.E. 2d 983, 113 Ill. Dec. 71 (1987). Moreover, members of this Court have recognized that the dicta in *Vitale* has created ambiguities. *Thigpen v. Roberts,* 468 U.S. 27, 35-37 (104 S. Ct. 2916, 2921-22, 82 L. Ed. 2d 23, 32 (Rehnquist, J.), dissenting); *Illinois v. Zegart,* 452 U.S. 948, 101 S. Ct. 3094, 69 L. Ed. 2d 961 (Burger, C. J.), dissenting from denial of petition for writ of certiorari).

The issue presented in this case is simple, but in need of clarification by this Court in light of the conflicting interpretations given to this Court's *Vitale* opinion.

Moreover, as the dissenting Judges in the New York Court of Appeals recognized, a criminal defendant should not be permitted to avoid prosecution for a homicide by entering a guilty plea to Driving While Intoxicated and a traffic infraction. The petitioner submits that the majority of the Court of Appeals incorrectly applied this Court's *Vitale* ruling.

As evidenced by the conflicting rulings of federal and state courts applying *Vitale*, this is a recurring problem arising throughout the nation and the petitioner submits that this Court should grant certiorari, review the determination of the New York State Court of Appeals and determine in accordance with well established decisions of this Court that there was no violation of the Fifth Amendment double jeopardy provision in charging Thomas J. Corbin with Manslaughter, Vehicular Manslaughter, Criminally Negligent Homicide and Assault in the Third Degree under counts one, two, four and five of the Indictment.

CONCLUSION

For these reasons, the writ of certiorari should be issued to review the order and opinion of the New York State Court of Appeals.

Dated: September 8, 1989

Respectfully submitted,

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By: BRIDGET RAHILLY STELLER
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APPENDIX A.

Opinion of the Court of Appeals, State of New York.

COURT OF APPEALS,

STATE OF NEW YORK.

2 NO. 132

IN THE MATTER

of

THOMAS J. CORBIN,

Appellant,

v.

JUDITH A. HILLERY, as Judge of the County Court, Dutchess County, *et al.*,

Respondents.

Richard T. Farrell, Ilene J. Miller, Brooklyn, & William G. Crane, Poughkeepsie, for appellant.

William V. Grady, DA, Dutchess County (Bridget R. Steller of counsel) respondent *pro se.*

Robert Abrams, Attorney General (Andrea Green of counsel) for respondent Hillery.

TITONE, J.

At issue in this appeal is whether an individual who has previously pleaded guilty to the misdemeanor of driving while intoxicated (Vehicle & Traffic Law § 1192[3]), as well as to a related traffic infraction, may subsequently be prosecuted on homicide, assault and other charges arising out of the same incident when the prosecution concedes its intention to use the facts underlying the former conviction to establish essential elements of the latter crimes. The constitutional problem has arisen in this case, despite the broad protections afforded by New York's statutory double jeopardy provisions (CPL, art 40), because, in this instance, those provisions are superseded by Vehicle & Traffic Law § 1800(d), which purports to authorize a subsequent vehicular assault and homicide prosecution even though the defendant has previously been prosecuted for and convicted of traffic violations for the same acts. A subsidiary question exists as to whether petitioner is precluded from invoking his right to be free from successive prosecutions for the same conduct because he was guilty of procuring the prior conviction, without the prosecutor's knowledge, as a means of avoiding prosecution for the more serious crimes (*see*, CPL 40.30[2][b]). Concluding that both issues should be resolved in petitioner's favor, we now reverse the Appellate Division judgment to the contrary and hold that petitioner's request for an order prohibiting further prosecution should have been granted.

I. *Factual Background*

On October 3, 1987, petitioner's automobile allegedly crossed a double yellow line and struck two other vehicles. As a result, petitioner and the passenger of one of the other vehicles were seriously injured and another individual was killed. Tests performed after the accident revealed that petitioner had a .19% blood alcohol level.

On the night of the accident, while he was in the hospital being treated for his own injuries, petitioner was served with two uniform traffic tickets, returnable October 29, 1987, charging him, respectively, with operating a motor vehicle in an intoxicated condition (Vehicle & Traffic Law § 1192[3]) and driving on the wrong side of the road (*see* Vehicle & Traffic Law § 1120). The return date of these traffic tickets was subsequently changed, apparently without notice to the District Attorney, from the 29th to the 27th of October, a night on which the District Attorney's office did not "cover" the Town Justice Court. The assistant district attorney who had prepared the paperwork on the traffic offense prosecutions (A.D.A. Glick) was inexplicably unaware that the accident had resulted in a fatality and, consequently, his written submissions to the court, which included a cover letter, a CPL 710.30 notice and a "statement of readiness," did not alert the court to the seriousness of the incident.

Petitioner appeared with his attorney on the scheduled return date and entered a plea of guilty to the charges contained in both traffic tickets. Petitioner's attorney did not volunteer that the case involved a fatality and, in response to a question by the Town Justice, indicated that he had had contact with the District Attorney's office about the case.[1] Although counsel had apparently expressed a preference to have sentence imposed immediately, the court decided to postpone sentencing until November 17, 1987, because the file contained no sentencing recommendation from the prosecutor.

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[1]The relevant portion of the transcript of the proceedings reads as follows:

Judge: Have you contacted [the] ADA's office?

Atty: Yes. We have received papers. We have also discussed this matter with Mr. Corbin [petitioner].

In fact, counsel's only "contact" with the District Attorney's office was his receipt of A.D.A. Glick's CPL 710.30 notice and statement of readiness.

On the date set for sentencing, the People were represented by A.D.A. Sauter, who was unaware that there had been a fatality, was unable to locate the file and had not spoken to A.D.A. Glick about the case. Nevertheless, Sauter did not request an adjournment so that she could ascertain the facts necessary to make an informed sentencing recommendation.

Petitioner's attorney remained silent, although he was aware that petitioner's automobile had been impounded in connection with an investigation of the accident. Thus, once again, the court remained ignorant of the severity of petitioner's offense. Petitioner was ultimately sentenced on his guilty pleas to a fine, a six-month revocation of his driver's license and other, related sanctions.

During the pendency of the traffic offense prosecution, other staff members within the District Attorney's office had actively been investigating the possibility of pressing more serious charges against petitioner. A.D.A. Chase, who was aware that a person had been killed in the accident began as early as October 6, 1987 to gather evidence. Despite his active involvement in building a homicide case against Petitioner, however, Chase did not attempt to ascertain the date petitioner was scheduled to appear in Town Justice Court on the traffic tickets, nor did he inform either the Town Justice Court or the assistant district attorney covering that court about his pending investigation. It was not until November 19, 1987, two days after the fact, that Chase learned of petitioner's guilty plea and sentencing.

A Grand Jury presentment was finally made in early January, 1988. The delay was allegedly occasioned, at least in part, by difficulties that the A.D.A. Chase encountered in obtaining a report by an accident reconstructionist. On January 19, 1988, an indictment was issued charging petitioner with one count of reckless manslaughter (Penal Law

§ 125.15[1]), two counts of second-degree vehicular manslaughter (Penal Law § 125.12),[2] one count of criminally negligent homicide (Penal Law § 125.10), one count of third-degree reckless assault (Penal Law § 120.00[2]), and two counts of driving while intoxicated (Vehicle & Traffic Law § 1192[2], [3]).

Petitioner promptly moved to dismiss the indictment on double jeopardy grounds. The motion was denied, however, after a hearing in which the County court in which the action was being prosecuted found that petitioner had procured the traffic prosecution, "without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution" for the more serious homicide charges (*see*, CPL 40.30[2][b]). Petitioner then commenced the present article 78 proceeding for a writ of prohibition, asserting, once again, that double jeopardy principles barred the prosecution of the January, 1988 indictment. The Appellate Division dismissed the petition without opinion, and this appeal, taken as of right on constitutional grounds, ensued. We now reverse. Since the double jeopardy clause of the United States Constitution bars prosecution of the homicide and assault counts and both the double jeopardy clause and

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[2]Count two charged petitioner with negligently causing death while driving with a blood alcohol count of .10% in violation of Vehicle & Traffic Law § 1192(2). Count three charged him with negligently causing death while operating a motor vehicle in an intoxicated condition in violation of Vehicle and Traffic Law § 1192(3).

the provisions of article 40 of the Criminal Procedure Law bar prosecution of the remaining counts, petitioner's request for a writ of prohibition should have been granted.[3]

II. *CPL 40.30(2)(b)*

As a threshold matter, we address the application of CPL 40.30(2)(b), which was the basis of the County Court's refusal to dismiss the indictment.[4] That subdivision provides for an exception to the general statutory prohibition against successive prosecutions (*see*, CPL 40.20) in cases where the previous prosecution "was for a lesser offense than could have been charged under the facts of the case,

---

[3]Of course, prohibition lies to restrain violations of both statutory and constitutional double jeopardy rights (*see, e.g., Matter of Plummer v. Rothwax*, 63 NY2d 243, 249 n4; *Matter of Wiley v. Altman*, 52 NY2d 410, 412 n2; *Hall v. Potoker*, 49 NY2d 501, 505 n1; *Matter of Abraham v. Justices of N.Y. Sup. Ct. of Bronx County*, 37 NY2d 560, 564). Further, an aggrieved defendant may seek immediate relief in the form of prohibition even where, as here, he has already made an unsuccessful motion to dismiss in the criminal court in which the challenged indictment is being prosecuted (*Matter of Wiley v. Altman, supra*, at 412-413 n2).

[4]We must take issue with the dissenter's suggestion that we have "imprudent[ly]" reviewed the facts despite a lack of power to do so (dissent, slip op, at 2). First, the "affirmed finding of fact" doctrine (*see*, Cohen & Karger, Powers of the New York Court of Appeals, § 111) has no application here, since the Appellate Division was the court of first instance in this prohibition proceeding. Second, there is no reason to assume that the Appellate Division did, in fact, review the "facts" that were before the County Court on petitioner's prior motion to dismiss the indictment, since the former court's dismissal of the proceeding without opinion could have been based instead upon its disposition of any number of threshold procedural questions (*see, Matter of Forte v. Supreme Ct.*, 48 NY2d 179, 184-185). Finally, even if the Appellate Division had reviewed the facts and even if it had made findings that were binding on this Court, we would still be obliged to examine the record to ensure that the findings are at least minimally supported by the evidence (*see*, Cohen & Karger, *supra*, § 116).

and the prosecution was procured by the defendants without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense." Although this provision has not previously been construed by our court, it is apparent that it was intended primarily to address situations in which the defendant or his attorney induces a local criminal court, before the District Attorney has entered the picture, to accept a guilty plea and enter a conviction for a relatively minor offense as a means of foreclosing the possibility of a prosecution for a more serious offense in superior court (Staff Comment to Proposed CPL 20.30[2][b], at 58, cited in 3 Zett, NY Crim Prac [1986 ed] § 22.5[2], at 22-26 & n15; *see, People v. DiShaw*, 54 AD2d 1122). Although not necessarily limited to such situations, the provision evidently was designed primarily to withhold statutory double jeopardy protection in those situations where the responsible prosecuting authority did not have the opportunity to be heard or to apprise the court of the aggravating facts before a conviction for a mere infraction or lesser misdemeanor was entered.

Thus, it is a principal requirement for the application of CPL 40.30(2)(b) that the prior prosecution have been procured "without the knowledge of the appropriate prosecutor" (*see, generally, People v. Daby*, 56 AD2d 875). In this case, that requirement is simply not satisfied. Although no representative of the Dutchess County District Attorney, the "appropriate prosecutor" (*see, id.*), was present on October 27, 1987, the date petitioner's guilty plea was accepted, the District Attorney's office had actively participated in the traffic infraction prosecution in the Town Justice Court by filing a CPL 710.30 notice and a statement of readiness. Moreover, the District Attorney's office was represented at the sentencing, the final step in what CPL 40.30(1)(a) defines as a "prior prosecution" for purposes of the statutory double jeopardy rules (*see, People v.*

Snyder, 99 AD2d 83, 85). Accordingly, while petitioner and his counsel may have been less than forthcoming in their dealings with the Town Justice Court at the time that petitioner's guilty plea was entered, it certainly cannot be said that the traffic infraction prosecution was conducted, or the conviction obtained, without the knowledge of the Dutchess County District Attorney's office.[5]

Further, whether or not petitioner's attorney deceived the Town Justice Court, as the dissenter contends, it cannot be said that the District Attorney's opportunity to oppose the lenient disposition was lost because of any misconduct by either petitioner or his attorney.[6] Rather, that opportunity was lost, and the Town Justice was left without a reason to

[5]The dissenter objects to our emphasis on the role assigned to the District Attorney under CPL 40.30(2)(b) (*see*, dissent, slip op, at 2), but offers no interpretation of his own for the statutory use of the phrase "without the knowledge of the appropriate prosecutor." Indeed, the dissenter's formulation of the statute's reach ("[p]rocurement means engineering your own prosecution and conviction on a lesser crime to avoid full punishment for criminal acts" [dissent, slip op, at 2]), as well as his analysis of petitioner's case, seems to ignore this aspect of the statute entirely. Significantly, the facts in this case do not even satisfy the dissenter's formulation of evasive engineering, since petitioner did not ask to be charged with the lesser traffic infractions, was not responsible for the change in appearance date which led to the District Attorney's absence at the plea allocution and, most certainly, did not "engineer" the Town Justice's ignorance of the facts surrounding his case. If anything, the latter circumstance was "engineered" by the District Attorney's office, which failed at every possible turn to bring the necessary facts to the Justice Court's attention.

[6]We note, however, that, contrary to the dissenter's contention, petitioner did not "actively [mislead] a justice of the peace into believing that no accident occurred, and no one was killed" (dissent, slip op, at 1). In fact, petitioner made no representations at all, "active" or otherwise, about the occurrence of an accident or the results of that accident. The sole discussion on the record that preceded the formal plea allocution on October 27, 1989 is reproduced in footnote 1 above

(Footnote continued on following page)

reconsider petitioner's previously entered guilty plea (*see, Matter of Lockett v. Juviler*, 65 NY2d 182, 186-187), because the prosecuting assistant district attorney's admitted lack of familiarity with the details of the case led her to remain silent at the sentencing. Thus, to apply CPL 40.30(2)(b) here would be to extend it well beyond the intended scope of its coverage. Accordingly, we decline to invoke the statute and thereby override petitioner's right to be free from successive prosecutions in these circumstances. That conclusion leads us directly to our consideration of the complex statutory and constitutional problems that this appeal presents.

(Footnote continued.)

(slip op, at 3). As is evident from the quoted colloquy, petitioner's attorney merely responded, in arguably truthful terms, to a simple question from the Town Justice as to whether counsel had had contact with the District Attorney. Further, the Town Justice's own hearing testimony negates any possibility that the attorney's conduct, whether misleading or not, was a causative factor in the lenient disposition petitioner received. The Justice testified that he asked his question specifically to elicit whether counsel "had some kind of letter or documentation from the District Attorney's office indicating their disposition as to sentencing," so that he "could accept the plea and sentence on that night." Having learned through counsel's response that no such documentation existed, the Justice postponed sentencing to give the District Attorney an opportunity to appear. Thus, whatever counsel intended by his terse response, it is apparent that the comment did not persuade the court to take action that was *favorable* to his client. Further, while counsel may have been less than forthcoming, both at the plea allocution and at the sentencing, and was unquestionably attempting to take advantage of the highly favorable tactical situation created by the prosecutor's omissions, we are reluctant to characterize his behavior as misconduct, much less to construe CPL 40.30(2)(b) in such a way as to encompass these circumstances (*see, People v. Snyder, supra; cf., People v. DiShaw*, 54 AD2d 1122, *supra*). While an attorney may certainly not, directly or indirectly, misrepresent the facts, a practitioner representing a client at a traffic violation prosecution should not be expected to *volunteer* information that is likely to be highly damaging to his client's position.

III. *Vehicle & Traffic Law § 1800(d)*

Analysis of the rules governing successive prosecutions in cases involving vehicular crimes must begin with Vehicle & Traffic Law § 1800(d), which provides that a conviction for a violation of any of the Vehicle & Traffic Law's prohibitions "shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle * * *." Because this is a specific statute obviously enacted for a special purpose, it must be deemed to take precedence over the more general rules for successive prosecutions that are contained in article 40 of the Criminal Procedure Law (*see, M/O Martinis v. Supreme Ct.*, 15 NY2d 240, 249 [plurality opinion per Dye, J.]; *see, also,* McKinney's Consol Laws, Book 1, Statutes, § 397). Thus, Vehicle & Traffic Law § 1800(d) supersedes CPL 40.20 and, to the extent that it does not conflict with constitutional double jeopardy principles, it permits successive prosecution for homicide and assault charges, notwithstanding a prior prosecution for traffic offenses arising out of the same incident (*see,* CPL 40.20[2]). Since petitioner was charged with homicide and assault crimes in the first five counts of the challenged indictment, Vehicle & Traffic Law § 1800(d) is directly implicated and we must therefore consider whether that statute may constitutionally be applied in these circumstances.

Our court has previously had occasion to consider the double jeopardy implications of section 1800(d) (*M/O Martinis v. Supreme Ct.* (*supra*). However, the split decision in that case did not definitively resolve the constitutional problem presented by that statute, particularly in light of the evolving nature of the federal constitutional double jeopardy rule. Accordingly, cases arising under that statute still possess a constitutional dimension, and it is to that dimension that we must now turn.

IV. *Federal Double Jeopardy Principles*

Our federal constitutional analysis must begin with *Blockburger v. United States* (284 US 299), in which the Supreme Court discussed what constitutes the "same offense" for purposes of the federal double jeopardy clause. Under the familiar *Blockburger* rule, if " 'each [penal] statute requires proof of an additional fact which the other does not,' " the offenses are not the same and successive prosecution is not forbidden (*Brown v. Ohio,* 342 US 161 quoting *Morey v. Commonwealth,* 108 Mass 433, 434). The *Blockburger* test "focuses on the proof necessary to prove the statutory elements of each offense rather than on the actual evidence to be presented at trial" (*Illinois v. Vitale,* 447 US 410, 416). In essence, to be the "same offense" within the meaning of the federal double jeopardy clause the crimes must have essentially the same statutory elements or one must be a lesser included offense of the other.

Accordingly, in *Illinois v. Vitale* (*supra*), the Supreme Court refused to prohibit a reckless manslaughter prosecution that arose out of a traffic incident although the defendant had already been charged with and had pleaded guilty to a traffic infraction ("failure to slow") arising out of the same incident. The *Vitale* Court stressed that reckless manslaughter did not, as a general rule, *require* proof of failure to slow and thus was not the "same offense" as failure to slow within the *Blockburger* analysis. However, the Court also went on to note, in pointed dictum that there would be a "substantial" double jeopardy problem if, on the trial of the manslaughter charge, the prosecution "relies on and proves a failure to slow * * * as the reckless act necessary to prove manslaughter" (447 US, at 421).

This dictum has direct application in this case. Although reckless manslaughter (Penal Law §125.15[1]) (count one), second-degree vehicular manslaughter (Penal Law §125.12) (counts two and three), criminally negligent

homicide (Penal Law §125.10) (count four) and third-degree reckless assault (Penal Law §120.00[2]) (count five) are clearly not the "same offenses" as the traffic offenses to which defendant previously pleaded guilty, *i.e.*, driving while intoxicated (Vehicle & Traffic Law §1192[3]) and failing to keep right (*id.*, §1120; *see, Illinois v. Vitale, supra; Blockburger v. United States, supra*), the prosecution here has affirmatively stated in its bill of particulars that it intends to use the acts underlying the latter offenses as the major part of its proof on the reckless and negligence elements of the former crimes. This statement of the prosecution's theory became a part of its pleadings and, until amended, was binding on the People (*see, People v. Shealy*, 51 NY2d 933; *People v. Barnes*, 50 NY2d 375, 379 n3; *see, also, People v. Grega*, 72 NY2d 489, 498). Thus, unlike in *Illinois v. Vitale* (*supra*), there is no need in this case to await the trial to ascertain whether the prosecution will rely on the prior traffic offenses as the acts necessary to prove the homicide and assault charges. The "substantial" double jeopardy problem identified in *Vitale* is apparent on the face of the People's pleadings.

Accordingly, prosecution of the homicide and assault counts in this indictment (counts one through five) is constitutionally prohibited, and Vehicle & Traffic Law §1800(d) cannot constitutionally be applied.[7]

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[7]Even without regard to the analysis in *Illinois v. Vitale* (*supra*), prosecution of the two second-degree vehicular manslaughter counts against petitioner (counts two and three) is prohibited because those crimes are the "same offenses" within the meaning of the traditional *Blockburger* test. Second-degree vehicular manslaughter is, in essence, the crime of criminally negligent homicide (*see*, Penal Law §125.10), with driving while intoxicated in violation of Vehicle & Traffic Law §1192(2) or (3) as an aggravating factor. Thus, driving while intoxicated in violation of Vehicle & Traffic Law §1192(3), the offense to which petitioner pleaded guilty, is unquestionably a lesser included offense of second-degree vehicular manslaughter, as that crime was

(Footnote continued on following page)

V. *Counts Six and Seven*

We consider the last two indictment counts separately because the analysis for these counts is different and, in fact, does not require resort to federal constitutional double jeopardy principles. Since neither count charges a homicide or an assault crime, Vehicle & Traffic Law §1800(d) is inapplicable by its terms and, thus, CPL 40.20, the general statutory double jeopardy provision, is controlling.

CPL 40.20(2) clearly prohibits prosecution of these counts, since they unquestionably arose out of the "same transaction" as the traffic offenses to which defendant previously pleaded guilty. Further, although not necessary to our holding, we note that these counts charge offenses which are indistinguishable from the misdemeanor to which petitioner previously pleaded guilty and, consequently, prosecution of these counts falls squarely within the constitutional double jeopardy prohibition. Accordingly, prosecution of these counts is now barred.

VI. *Conclusion*

Notwithstanding the language of Vehicle & Traffic Law §1800(d), the double jeopardy clause of the Fifth Amendment to the United States Constitution bars prosecution of the homicide and assault offenses charged in the indictment. The remainder of the indictment charges are barred

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(Footnote continued.)

charged in count three of the indictment, and accordingly, it is the "same offense" under *Blockburger*. Further, while count two of the indictment charged second-degree manslaughter while driving in violation of Vehicle & Traffic Law §1192(2), a linguistically different offense from the one to which petitioner pleaded, the proof necessary to establish the "driving while intoxicated" elements of each of these crimes is the same. Consequently, the crimes charged in count two should also be considered the "same offense" for purposes of *Blockburger*.

by our State's statutory rules governing successive prosecutions. Accordingly, the judgment of the Appellate Division dismissing the petition should be reversed, without costs, the petition granted and further prosecution prohibited.
M/O Corbin v. Hillery
Case No. 132

WACHTLER, Ch. J. (Dissenting):

It devalues the double jeopardy clause of the Fifth Amendment of the Federal Constitution when a defendant unquestionably intoxicated at the time his auto struck and killed a person, avoids a homicide prosecution by actively misleading a justice of the peace into believing that no accident occurred, and no one was killed. CPL §40.30(2)(b) prevents such fraudulent schemes to avoid criminal liability, by stating that a prosecution "procured by the defendant, without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense" cannot be invoked as a bar to the reprosecution under double jeopardy principles.

In the case now before us, petitioner, while intoxicated, drove his car across the center line, hitting another auto head on and killing a person. He then appeared in local court, and, with no District Attorney present, his attorney intentionally misled the court by stating that the District Attorney had been consulted on the case. Petitioner then pled guilty to a misdemeanor—driving while intoxicated—in order to prevent prosecution for homicide. Therefore this case falls squarely within CPL §40.30(2)(b) and the homicide prosecution should not be barred.

Indeed, two courts with power to review the facts—County Court and the Appellate Division—found that defendant's attorney intentionally misled the Justice of the Peace, and procured a minor conviction for his client, Corbin, so that criminal responsibility for causing a death could be avoided. This Court has no power in this case to

review the facts in this case. At this stage of appeal, it is imprudent and unwarranted for the majority to dispense with the factual assessments of those closest to the events, and on the dry record reach a different conclusion, all so that a constitutional question can be reached.

Moreover, lest there be any mistake, I note that the majority's test for "procurement," applied for the first time here, is woven from whole cloth tailored for the purpose of reaching the conclusion the majority desires. There is nothing in the case law, the statutory language, or the principles of double jeopardy from which a test focussing on the "opportunity to oppose the lenient disposition" by the District Attorney can be devised. Double jeopardy means being prosecuted by the State twice for the same conduct. Procurement means engineering your own prosecution and conviction on a lesser crime to avoid full punishment for criminal acts. In this case, using deception, petitioner prosecuted himself, toward the end of avoiding criminal liability for causing the death of another. This is procurement, as the lower courts found, and for that reason I respectfully dissent.

The lengthy footnote protestations of the majority do not, in the main, require comment. One does. I have not "distorted" the facts. The two lower courts found the facts as I have stated them in this opinion. These findings are supported by the record, as the majority opinion itself manifests (*see*, majority opinion at p 3). Of course, the majority is free to reject or ignore these findings, but it should not allege "distortion" when I have done no more than restate what was found by the lower courts, particularly when those findings are supported by the record.

Finally, it deserves comment that there appears to be a less onerous method of reaching the conclusion the majority desires, without declaring a statute unconstitutional. As the heading to VTL 1800 indicates, that section deals only with traffic infractions. If the majority feels it must reject

the determinations of the lower courts and find no procurement here, at least they should heed the admonition that statutes should be interpreted so as to be constitutional. When VTL 1800(d) is read as only applying to traffic infractions, petitioner's reprosecution is barred by CPL 40.20, and there is no need to employ what should be the court's last option of finding a statute unconstitutional.

* * *

Judgment reversed, without costs, petition granted and further prosecution prohibited. Opinion by Judge Titone in which Judges Kaye, Alexander and Hancock concur. Chief Judge Wachtler dissents and votes to affirm in an opinion in which Judge Bellacosa concurs, Judge Simons took no part. Decided July 13, 1989

APPENDIX B.

Order of Appellate Division, Second Department.

William C. Thompson, J.P.
Charles B. Lawrence
Isaac Rubin
Geraldine T. Eiber, JJ.

MOTION NOS. 7263-7264

IN THE MATTER

of

THOMAS J. CORBIN,

Petitioner,

v.

JUDITH A. HILLERY, as Judge of the County Court, Dutchess County, and WILLIAM V. GRADY, as District Attorney of Dutchess County,

Respondents.

Proceeding by petitioner pursuant to CPLR Article 78, (1) to stay and enjoin further prosecution of Dutchess County indictment No. 6/88, entitled *The People v. Thomas J. Corbin*, pending determination of this proceeding and (2) to prohibit any further prosecution arising out of an automobile accident on October 3, 1987, occurring on N.Y.

State Route 55, in the Town of LaGrange, Dutchess County, which was the subject of a prior prosecution, conviction and sentence within the meaning of Article 40 of the CPL.

Motion by petitioner to stay further prosecution of indictment No. 6/88 Dutchess County, pending determination of this petition.

Upon the papers filed in support of the petition and motion and the papers filed in opposition thereto, it is

ORDERED that the application is denied and the proceeding is dismissed, without costs, and it is further,

ORDERED that the motion is denied as academic and the temporary stay contained in the order to show cause dated August 31, 1988, vacated.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

October 26, 1988

APPENDIX C.

Opinion of County Court (8/18/88).

STATE OF NEW YORK, COUNTY COURT,

COUNTY OF DUTCHESS.

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs,

against

THOMAS J. CORBIN,

Defendant.

Ind. No. 6/88
Index No. 1988/377

By Indictment No. 6/88 dated January 19th, 1988, the Dutchess County Grand Jury has accused the above defendant of the following crimes: Manslaughter in the Second Degree, a Class C Felony, in violation of Section 125.15, Subdivision 1 of the Penal Law; Vehicular Manslaughter in the Second Degree, a Class D Felony, in violation of Section 125.12, Subdivisions 1 and 2 of the Penal Law (two counts); Criminally Negligent Homicide, a Class E Felony, in violation of Section 125.10 of the Penal Law; Assault in the Third Degree, a Class A Misdemeanor, in violation of Section 120.00, Subdivision 2 of the Penal Law; Operating a Motor Vehicle While Under the Influence

of Alcohol, a "Class A" Misdemeanor, in violation of Section 1192, Subdivision 2 of the Vehicle and Traffic Law; and Operating a Motor Vehicle While Under the Influence of Alcohol, a "Class A" Misdemeanor, in violation of Section 1192, Subdivision 3 of the Vehicle and Traffic Law of the State of New York.

Pursuant to an order of this Court dated June 27th, 1988, a hearing was held before this Court on August 12th and August 15th, 1988 to ascertain the facts surrounding defendant's plea and sentence in the Town of LaGrange Justice Court for common law Driving While Intoxicated and Failure to Keep to the Right. It is as a result of these convictions by guilty pleas on October 27th, 1987 and subsequent sentence on November 17th, 1987 that defendant has raised a bar to the instant Indictment on double jeopardy grounds.

Defendant was issued two uniform traffic tickets on October 3rd, 1987 for common law Driving While Intoxicated and Failure to Keep to the Right after two motor vehicle collisions on Route 55 in the Town of LaGrange, County of Dutchess and State of New York. At his arraignment in the Town of LaGrange Justice Court on October 27th, 1987, defendant pled guilty to both charges and was sentenced on November 17th, 1987 on the common law Driving While Intoxicated charge to a Three Hundred Fifty ($350.00) Dollar fine, a Ten ($10.00) Dollar surcharge, license revocation for six months and Article 21 driving school. Defendant, who was subsequently indicted on January 19th, 1988 by a Dutchess County Grand Jury for the crimes of Manslaughter in the Second Degree, Vehicular Manslaughter in the Second Degree (two counts), Criminally Negligent Homicide, Assault in the Third Degree, and operating a Motor Vehicle While Under the Influence of Alcohol (statutory and common law), contends that the Indictment is barred on double jeopardy grounds since it arises out of the same facts and circumstances for which the

two uniform traffic tickets were issued and to which he pled guilty and was sentenced by a local justice court judge.

This Court must determine whether defendant's prior convictions bar further prosecution for a greater offense arising out of the same alleged acts or whether prosecution is not barred since defendant's prior convictions were for lesser offenses than could have been charged on the same alleged facts because the prosecution was procured by the defendant without the knowledge of the appropriate prosecutor, for the purpose of avoiding the greater offense or alternatively, whether Section 1800, Subdivision d of the Vehicle and Traffic Law of the State of New York is dispositive of the Double Jeopardy issue.

The following witnesses testified for the People: Assistant District Attorneys Mark H. Glick, Frank M. Chase, and Heidi Sauter; Town of LaGrange Justice Edmund V. Caplicki, Jr., and Town of LaGrange Court Clerk Sandra Dillon. The defendant called the following witnesses: Assistant District Attorney Thomas J. Dolan, Mark Reisman, Esq., and William G. Crane, Esq., an associate and partner, respectively, of the law firm of Crane, Wolfson, Roberts & Greller, Esqs., which law firm represented the defendant in the local court and which law firm represents the defendant in this Court.

Findings of Fact.

The defendant was Indicted for Manslaughter in the Second Degree, Vehicular Manslaughter in the Second Degree, Criminally Negligent Homicide, Assault in the Third Degree, and operating a Motor Vehicle While Under the Influence of Alcohol (two counts), for an incident which occurred on October 3rd 1987 on Route 55 in the Town of LaGrange, County of Dutchess and State of New York, as a result of defendant allegedly operating his motor vehicle while being both statutorily intoxicated and while being

intoxicated and in an intoxicated manner and driving his motor vehicle into the opposite lane of traffic and colliding with another motor vehicle traveling in the opposite direction causing the death of one occupant and physical injury to another occupant of the other motor vehicle.

The defendant was issued a Uniform Traffic Ticket for Operating a Motor Vehicle While Under the Influence of Alcohol and a Uniform Traffic Ticket for Failure to Keep to the Right. Assistant District Attorney Thomas J. Dolan was present at the scene to assist the investigating law enforcement agency in obtaining a Court ordered blood sample in the event the defendant refused to consent to same. The defendant was transported to a local hospital where a blood sample was taken from him for the purpose of law enforcement officials ascertaining his blood alcohol content. Assistant District Attorney Mark H. Glick, the DWI prosecutor for the Town of LaGrange Justice Court, sent out a letter dated October 14th, 1987 (People's Exhibit #1 in Evidence) to the Town of LaGrange Justice Court and to the defendant enclosing the People's 710.30 notice and statement of readiness in the matter of People v. Thomas J. Corbin. Assistant District Attorney Glick was not aware that this motor vehicle accident resulted in a fatality when he transmitted these documents. Assistant District Attorney Frank M. Chase, who was in charge of the special DWI prosecutors, took charge of this case on October 6th, 1987 and was aware on that date that the motor vehicle accident had resulted in a fatality and as a result he began to gather evidence, impounded the vehicles for future inspection, had pictures taken, contacted the arresting agency so that blood samples taken would be preserved, directed that statements be taken by the arresting agency and contacted an accident reconstructionist to begin an investigation. Chase received the New York State certified lab report of defendant's blood alcohol content on October 30th, 1987. On November 12th, 1987, Chase transmitted a letter to William G. Crane Esq., whom he had learned on October 6th, 1987 from a

member of the investigating law enforcement agency represented the defendant, advising him that the vehicles involved in the motor vehicle collision on October 3rd, 1987 had been impounded and could be examined by his office and that said vehicles had been examined by representatives of the District Attorney's office in preparation for a potential Grand Jury presentation (People's Exhibit #4 in Evidence). The District Attorney's office's investigation had not been completed by November 12th, 1987 because it was not in receipt of the accident reconstructionist's report which report was necessary in order to make a determination as to culpability based on the report reviewing road conditions, weather conditions, speed of the vehicles, and condition of the vehicles on the night of the collision. On November 19th, 1987 Chase learned of defendant's pleas and sentences in the Town of LaGrange Justice Court. Prosecutor Chase never ascertained the return date of the summonses issued to defendant on the night of the motor vehicle collision, never advised the local justice court that the matter was under continuing investigation by his office, never advised the local Town Justice not to accept a plea on the two tickets and never advised the Assistant District Attorney who covered the local town justice court not to accept a plea on the two Uniform Traffic Tickets.

On October 27th, 1987, the defendant appeared with his attorney, Mark Reisman, Esq., who had met the defendant for the first time that evening and who had been instructed by the senior partner in his firm, William G. Crane, Esq., to plead defendant guilty to the two Uniform Traffic Tickets. No Assistant District Attorney was present that evening in the Town of LaGrange Justice Court because it was not a night that the District Attorney's Office was scheduled to be present in that Court. At no time did defendant or his attorney advise the Court that this incident involved an accident or a fatality either during the allocution, prior to the allocution or subsequent to the allocution. Town Justice

Caplicki asked Attorney Mark Reisman whether he had contacted the District Attorney's Office concerning this matter and Reisman replied that he had contact with the District Attorney's Office. Attorney Reisman's only contact at the time of plea with the District Attorney's Office was receiving the CPL 710.30 notice and the CPL 30.30 notice from his client. No member of the defendant's law firm had contacted the District Attorney's Office prior to the defendant entering his guilty plea to the two Uniform Traffic Tickets. Defendant pled guilty to both Uniform Traffic Tickets. Defense counsel then advised the Court that defendant requested to be sentenced that evening.

At the time of defendant's pleas, Town of LaGrange Justice Edmund V. Caplicki, Jr., was not aware that the incident which had occurred on October 3rd, 1987 involved an accident or a fatality, nor was the Town Court in possession of a CPL 30.30 notice. Since Judge Caplicki had not received a written sentencing recommendation from Assistant District Attorney Heidi Sauter, the Assistant District Attorney who covered his Town Court, he adjourned sentencing until November 17th, 1987. On November 17th, 1987, the night of defendant's sentencing, the defendant, Mark Reisman, Esq., William G. Crane, Esq., and Assistant District Attorney Heidi Sauter were present in court. Prior to the date of defendant's sentencing William G. Crane, Esq., had received a letter from the District Attorney's Office advising that the vehicles were impounded and examined in preparation for a potential Grand Jury presentation.

Assistant District Attorney Sauter had not been able to locate the District Attorney's Office file prior to her Court appearance and was unable to communicate with Assistant District Attorney Glick. Assistant District Attorney Sauter was not aware at the time of sentencing that this case involved a fatality which was under continuing investigation by the District Attorney's Office.

Although Assistant District Attorney Sauter was not familiar with the particulars of this case, she did not request an adjournment of sentencing so that she could make an intelligent informed recommendation with respect to sentencing. Defendant was sentenced on the Driving While Intoxicated charge to a Three Hundred Fifty ($350.00) Dollar fine, six months revocation of his driver's license, a Ten ($10.00) Dollar surcharge, twenty (20) days conditional license and Article 21 Driving School.

Defendant alleges that CPL Section 40.20, Subdivision 1, prohibits a person from being twice prosecuted for the same offense and that the exceptions under CPL Section 40.20, Subdivision 2, and under CPL Section 40.30 are not applicable in this case. The defendant further alleges that in order to prove the elements of the crimes of manslaughter as charged, the People must rely on the very acts for which the defendant has previously been convicted, namely, common law driving while intoxicated and failure to keep to the right.

The People contend that defendant's prior convictions in the Town of LaGrange Justice Court do not bar the instant prosecution under Section 1800(d) of the Vehicle and Traffic Law. Furthermore the People contend that this Indictment is an exception to defendant's double jeopardy claim because defendant's plea in Town Court was a nullity since it was procured without knowledge of the appropriate prosecutor to avoid prosecution for the greater offense CPL 40.30, Subdivision 2 (b).

The Court does not find a bar to the instant indictment on double jeopardy grounds. CPL 40.20 (subd. 1) provides that "a person may not be twice prosecuted for the same offense." However, CPL 40.30 (subd. 2 par. b) provides that "a person is not deemed to have been prosecuted for an offense, within the meaning of CPL Section 40.20, when . . . such prosecution was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant without the

knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense."

Based on the testimony and proof adduced at this hearing, the Court finds the credible evidence reveals that there was a misrepresentation by defense counsel to the Town Justice at the time the plea was entered. Defense counsel replied affirmatively to the presiding justice's inquiry prior to accepting the pleas as to whether the District Attorney's Office had been contacted regarding this matter. The Court finds that this response constituted a crucial and material misrepresentation of fact which was relied upon by the Court in believing that the District Attorney's Office had prior knowledge of defendant's intention to plead guilty and implicitly that the District Attorney's Office consented to the entry of the two guilty pleas.

Furthermore, the Court finds that the failure of defendant and/or his counsel to inform Judge Caplicki that there had been two automobile accidents, one of which involved a fatality, coupled with the defense counsel's request for immediate sentencing, in this Court's opinion, created a situation where the non-disclosure of those facts was prejudicial to the fair administration of justice. Additionally, the failure of defense counsel, upon the receipt of Assistant District Attorney Chase's letter dated November 12th, 1987, to either communicate with Assistant District Attorney Chase to clarify the status of the case or to inform the Town Court Judge of this correspondence constituted a material misrepresentation of fact which was relied on by Judge Caplicki and which was prejudicial to the administration of justice. Arguably, it was, and is, the responsibility of the District Attorney's Office to be familiar with the files in their office and this issue would have been avoided by the implementation of safeguards to prevent the occurrence of such a situation. The Court, however, finds that the failure of defense counsel, on October 27th, 1987 to inform the Court that these pleas arose out of an incident involving

a fatality and further that the failure of counsel to inform the Court on November 17th, 1987 of Assistant District Attorney Chase's written communication leads this Court to no other conclusion than that the proceedings involving the taking of the pleas and the subsequent sentencings were carried out in such a manner and under circumstances which make those procedures as a matter of law a nullity (see CPL Section 40.30, Subd. 2(b); *Santobello v. New York*, 404 US 257; *Lynch v. Overholser*, 369 US 705; *People v. Barkin*, 49 NY2d 901; *People v. Bartley*, 47 NY 965; see also, Bellacosa, "Practice Commentary" to CPL 40.30, McKinney's Consol. Laws of New York).

Additionally, the Court further finds that Vehicle and Traffic Law Section 1800, Subdivision d, provides "a conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle or motorcycle."

The Court of Appeals in the *Matter of Martinis v. Supreme Court* (15 NY2d 240, 248), held "Quite obviously, its purpose and design were intended to remove the very possibility here contended for, that is, to prevent prosecution upon a charge arising under the Vehicle and Traffic Law as a misdemeanor, whatever the result, from becoming a bar to a prosecution for an 'assault' or for a 'homicide' defined in the Penal Law."

The Court of Appeals, continuing at page 250 (Martinis) further held:

> "It would be a travesty of justice to hold that the prior prosecution upon the minor traffic offense as a misdemeanor precludes the subsequent prosecution for homicide as a felony. Such offenses are not so identical as to satisfy the traditional concept of double jeopardy."

This Court finds that the Court of Appeals in *Matter of Martinis v. Supreme Court, supra* at page 248, ruled on the constitutionality of Vehicle and Traffic Law Section 1800, Subdivision d, and is dispositive of the Double Jeopardy issue in this case. The Court of Appeals held:

> "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact for which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other" (*Gavieres v. United States*, 220 US 338, 342).

For the foregoing reasons, the defendant's motion to dismiss the Indictment on double jeopardy grounds is denied.

As to defendant's motion for Inspection of the Grand Jury minutes and Dismissal of the Indictment on the grounds that such proceedings were defective as addressed in Section II of defendant's Omnibus Motion, the same is granted to the extent that the Court has reviewed such minutes for the purpose of determining defendant's motion to dismiss upon the ground that such inspection would show that the defendant did not act with requisite criminal culpability that the evidence was otherwise insufficient to establish the necessary prerequisites for a true bill, and that the evidence upon which the indictment was based was otherwise inadequate and improper. Such Grand Jury evidence has been viewed most favorably as to the People (*People v. Warner-Lambert Co.*, 51 NY2d 295, 299). Upon such a motion, the defendant has the burden of proof, and such motion may be granted only upon a clear showing of insufficiency (*People v. Howell*, 3 NY2d 672, 675).

Having examined the minutes of the testimony before the Grand Jury dated January 14th and January 19th, 1988, the

Court determines that the indictment is based upon evidence which is legally sufficient to establish that the defendant committed the offenses set forth therein and competent and admissible evidence before the Grand Jury provides reasonable cause to believe that the defendant committed those offenses (CPL 190.65; *People v. Mayo*, 36 NY2d 1002; *People v. Haney*, 30 NY2d 328).

The Court has also reviewed the instructions given by the District Attorney to the Grand Jury and the same satisfy the standards applicable to Grand Jury proceedings (*People v. Valles*, 62 NY2d 36; *People v. Calbud, Inc.*, 49 NY2d 389). Accordingly, the motion to dismiss the indictment is denied.

This shall constitute the decision and order of this Court.

So ordered.

Dated: August 18th, 1988
Poughkeepsie, New York

HON. JUDITH A. HILLERY
Dutchess County Court Judge

To:

William V. Grady, Esq.
District Attorney
Thomas J. Dolan, Esq., Of Counsel
10 Market Street
Poughkeepsie, New York 12601

Rosen, Crane & Wolfson, Esqs.
Albert Brackley, Esq., Of Counsel
Attorney for Defendant
11 Market Street
Poughkeepsie, New York 12601

(3)

No. 89-474

IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM V. GRADY, District Attorney of Dutchess County,
Petitioner,

against

THOMAS J. CORBIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Revised Brief in Opposition to Petition for a Writ of Certiorari

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Questions Presented

1. Whether section 1800(d) of the New York State Vehicle and Traffic Law should be struck down as violative of the Fifth Amendment of the United States Constitution provisions against double jeopardy.

2. Whether respondent's convictions for Driving while Intoxicated and Failure to keep Right furnish a bar under the provisions of the Fifth Amendment against double jeopardy against a subsequent prosecution for various charges of homicide and assault all arising out of the same automobile accident.

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TABLE OF AUTHORITIES

Factual Background as Stated by the New York Court of Appeals

On October 3, 1987, petitioner's automobile allegedly crossed a double yellow line and struck two other vehicles. As a result, petitioner and the passenger of one of the other vehicles were seriously injured and another individual was killed. Tests performed after the accident revealed that petitioner had a .19% blood alcohol level.

On the night of the accident, while he was in the hospital being treated for his own injuries, petitioner was served with two uniform traffic tickets, returnable October 29, 1987, charging him, respectively, with Operating a Motor Vehicle in an Intoxicated condition (Vehicle & Traffic Law section 1192(3)) and Driving on the Wrong Side of the Road (See, Vehicle & Traffic Law section 1120). The return date of these traffic tickets was subsequently changed, apparently without notice to the District Attorney, from the 29th to the 27th of October, a night on which the District Attorney's office did not "cover" the Town Justice Court. The assistant district attorney who had prepared the paperwork on the traffic offense prosecutions (A.D.A. Glick) was inexplicably unaware that the accident had resulted in a fatality and, consequently, his written submissions to the Court, which included a cover letter, a notice pursuant to Criminal Procedure Law section 710.30, and a "statement of readiness," did not alert the Court to the seriousness of the incident.

Petitioner appeared with his attorney on the scheduled return date and entered a plea of guilty to the charges contained in both traffic tickets. Petitioner's attorney did not volunteer that the case involved a fatality and, in response to a question by the Town Justice, indicated that

he had had contact with the District Attorney's office about the case. Although counsel had apparently expressed a preference to have sentence imposed immediately, the Court decided to postpone sentencing until November 17, 1987, because the file contained no sentencing recommendation from the prosecutor.

On the date set for sentencing, the People were represented by A.D.A. Sauter, who was unaware that there had been a fatality, was unable to locate the file and had not spoken to A.D.A. Glick about the case. Nevertheless, Sauter did not request an adjournment so that she could ascertain the facts necessary to make an informed sentencing recommendation.

Petitioner's attorney remained silent, although he was aware that petitioner's automobile had been impounded in connection with an investigation of the accident. Thus, once again, the Court remained ignorant of the severity of petitioner's offense. Petitioner was ultimately sentenced on his guilty pleas to a fine, a six-month revocation of his driver's license and other related sanctions.

During the pendency of the traffic offense prosecution, other staff members within the District Attorney's office had actively been investigating the possibility of pressing more serious charges against petitioner. A.D.A. Chase, who was aware that a person had been killed in the accident, began as early as October 6, 1987 to gather evidence. Despite his active involvement in building a homicide case against petitioner, however, Chase did not attempt to ascertain the date petitioner was scheduled to appear in Town Justice Court on the traffic tickets, nor did he inform either the Town Justice Court or the assistant district attorney covering that Court about his pending investigation. It was not until November 19, 1987,

two days after the fact, that Chase learned of petitioner's guilty plea and sentencing.

A Grand Jury presentment was finally made in early January, 1988. The delay was allegedly occasioned, at least in part, by difficulties that the A.D.A. Chase encountered in obtaining a report by an accident reconstructionist. On January 19, 1988, an Indictment was filed charging petitioner with one count of Reckless Manslaughter (Penal Law section 125.15(1)), two counts of Second-Degree Vehicular Manslaughter (Penal Law section 125.12), one count of Criminally Negligent Homicide (Penal Law section 125.10), one count of Third-Degree Reckless Assault (Penal Law section 120.00(2)), and two counts of Driving While Intoxicated (Vehicle & Traffic Law sections 1192(2), (3)).

Petitioner promptly moved to dismiss the Indictment on double jeopardy grounds. The motion was denied, however, after a hearing in which the County Court in which the action was being prosecuted found that petitioner had procured the traffic prosecution, "without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution" for the more serious homicide charges. (See, Criminal Procedure Law section 40.30(2)(b)). Petitioner then commenced the present proceeding pursuant to Article 78 of the New York State Civil Practice Law and Rules for a writ of prohibition, asserting, once again, that double jeopardy principles barred the prosecution of the January, 1988 Indictment. The Appellate Division dismissed the petition without opinion.

Author's note: The Court of Appeals reversed and prohibited further prosecution.

The Statutes

U.S. Const. Amend. 5:

> . . . [N]or shall any person be subject for the same offense to be twice placed in jeopardy of life or limb . . .

N.Y. State Const., Art. 1, Section 6:

> . . . No person shall be subject to be twice put in jeopardy for the same offense . . .

N.Y. State Criminal Procedure Law:

§ 40.10 Previous prosecution; definitions of terms

The following definitions are applicable to this article:

1. "Offense." An "offense" is committed whenever any conduct is performed which violates a statutory provision defining an offense; and when the same conduct or criminal transaction violates two or more such statutory provisions each such violation constitutes a separate and distinct offense. The same conduct or criminal transaction also establishes separate and distinct offenses when, though violating only one statutory provision, it results in death, injury, loss or other consequences to two or more victims, and such result is an element of the offense as defined. In such case, as many offenses are committed as there are victims.

2. "Criminal transaction" means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so

closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.

§ 40.20 Previous prosecution; when a bar to second prosecution

1. A person may not be twice prosecuted for the same offense.

2. A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless:

(a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or
(b) Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil; or
(c) One of such offenses consists of criminal possession of contraband matter and the other offense is one involving the use of such contraband matter, other than a sale thereof; or
(d) One of the offenses is assault or some other offense resulting in physical injury to a person, and the other offense is one of homicide based upon the death of such person from the same physical injury, and such death occurs after a prosecution for the assault or other non-homicide offense; or
(e) Each offense involves death, injury, loss or other consequence to a different victim; or

(f) One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state.

§ 40.30 Previous prosecution; what constitutes

1. Except as otherwise provided in this section, a person "is prosecuted" for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either:

(a) Terminates in a conviction upon a plea of guilty; or
(b) Proceeds to the trial stage and a jury has been impaneled and sworn or, in the case of a trial by the court without a jury, a witness is sworn.

2. Despite the occurrence of proceedings specified in subdivision one, a person is not deemed to have been prosecuted for an offense, within the meaning of section 40.20, when:

(a) Such prosecution occurred in a court which lacked jurisdiction over the defendant or the offense; or
(b) Such prosecution was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant, without the knowledge of the appropriate

prosecutor, for the purpose of avoiding prosecution for a greater offense.

3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its prepleading status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument.

4. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which dismisses the accusatory instrument but authorizes the people to obtain a new accusatory instrument charging the same offense or an offense based upon the same conduct, the nullified proceedings do not bar further prosecution of such offense under any new accusatory instrument obtained pursuant to such court order or authorization.

§ 40.40 Separate prosecution of jointly prosecutable offenses; when barred

1. Where two or more offenses are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction, pursuant to paragraph (a) of subdivision two of section 200.20, such person may not, under circumstances prescribed in this section, be separately prosecuted for such offenses even though such separate prosecutions are not otherwise barred by any other section of this article.

2. When (a) one of two or more joinable offenses of the kind specified in subdivision one is charged in an accusatory instrument, and (b) another is not charged

therein, or in any other accusatory instrument filed in the same court, despite possession by the people of evidence legally sufficient to support a conviction of the defendant for such uncharged offense, and (c) either a trial of the existing accusatory instrument is commenced or the action thereon is disposed of by a plea of guilty, any subsequent prosecution for the uncharged offense is thereby barred.

3. When (a) two or more of such offenses are charged in separate accusatory instruments filed in the same court, and (b) an application by the defendant for consolidation thereof for trial purposes, pursuant to subdivision five of section 200.20 or section 100.45, is improperly denied, the commencement of a trial of one such accusatory instrument bars any subsequent prosecution upon any of the other accusatory instruments with respect to any such offense.

N.Y. State Penal Law:

§ 120.00 Assault in the third degree

A person is guilty of assault in the third degree when: . . . .

2. He recklessly causes physical injury to another person; . . . .

Assault in the third degree is a class A misdemeanor.

§ 120.03 Vehicular assault in the second degree

A person is guilty of vehicular assault in the second degree when:

(1) with criminal negligence he causes serious physical injury to another person, and

(2) causes such serious physical injury by operation of a vehicle in violation of subdivision two, three or four of section eleven hundred ninety-two of the vehicle and traffic law.

Vehicular assault in the second degree is a class E felony.

§ 120.04 Vehicular assault in the first degree

A person is guilty of vehicular assault in the first degree when he:

(1) commits the crime of vehicular assault in the second degree as defined in section 120.03, and

(2) commits such crime while knowing or having reason to know that his license or his privilege of operating a motor vehicle in the state or his privilege of obtaining a license issued by the commissioner of motor vehicles is suspended or revoked and such suspension or revocation is based upon either a refusal to submit to a chemical test pursuant to section eleven hundred ninety-four of the vehicle and traffic law or following a conviction for a violation of any of the provisions of section eleven hundred ninety two of the vehicle and traffic law.

Vehicular assault in the first degree is a class D felony.

§ 125.10 Criminally negligent homicide

A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

Criminally negligent homicide is a class E felony.

§ 125.12 Vehicular manslaughter in the second degree

A person is guilty of vehicular manslaughter in the second degree when he:

(1) commits the crime of criminally negligent homicide as defined in section 125.10, and

(2) causes the death of such other person by operation of a vehicle in violation of subdivision two, three or four of section eleven hundred ninety-two of the vehicle and traffic law.

Vehicular manslaughter in the second degree is a class D felony.

§ 125.13 Vehicular manslaughter in the first degree

A person is guilty of vehicular manslaughter in the first degree when he:

(1) commits the crime of vehicular manslaughter in the second degree as defined in section 125.12, and

(2) commits such crime while knowing or having reason to know that his license or his privilege of operating a motor vehicle in the state or his privilege of obtaining a license issued by the commissioner of motor vehicles is suspended or revoked and such suspension or revocation is based upon either a refusal to submit to a chemical test

pursuant to section eleven hundred ninety-four of the vehicle and traffic law or following a conviction for a violation of any of the provisions of section eleven hundred ninety-two of the vehicle and traffic law.

Vehicular manslaughter in the first degree is a class C felony.

§ 125.15 Manslaughter in the second degree

A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person;

. . . .

Manslaughter in the second degree is a class C felony.

New York State Vehicle and Traffic Law:

§ 511. Operation while license or privilege is suspended or revoked; aggravated unlicensed operation

1. Aggravated unlicensed operation of a motor vehicle in the third degree. (a) A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the third degree when he operates a motor vehicle upon a public highway while knowing or having reason to know that his license or his privilege of operating a motor vehicle in this state or his privilege of obtaining a license issued by the commissioner is suspended or revoked.

(b) Aggravated unlicensed operation of a motor vehicle in the third degree is a traffic infraction. When a person is convicted of this offense, the sentence of the court must be: (i) a fine of not less than two hundred dollars

nor more than five hundred dollars; or (ii) a term of imprisonment of not more than fifteen days; or (iii) both such fine and imprisonment.

2. Aggravated unlicensed operation of a motor vehicle in the second degree. (a) A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the second degree when he:

(i) commits the offense of aggravated unlicensed operation of a motor vehicle in the third degree as defined in subdivision one of this section; and

(ii) has previously been convicted of an offense that consists of or includes the elements comprising the offense committed within the immediately preceding eighteen months; or

(iii) the suspension or revocation is based upon a refusal to submit to a chemical test pursuant to section eleven hundred ninety-four of this chapter or upon a conviction for a violation of any of the provisions of section eleven hundred ninety-two of this chapter; or

(iv) the suspension was a mandatory suspension pending prosecution of a charge of a violation of section eleven hundred ninety-two of this chapter ordered pursuant to paragraph (e) of subdivision two of section eleven hundred ninety-three of this chapter or other similar statute.

(b) Aggravated unlicensed operation of a motor vehicle in the second degree is a misdemeanor. When a person is convicted of this crime under subparagraphs (i) and (ii) of paragraph (a) of this subdivision, the sentence of the court must be: (i) a fine of not less than five hundred dollars; and either (ii) a term of imprisonment not to exceed one hundred eighty days or (iii) where appropriate a sentence of probation as provided in subdivision six of this section. When a person is convicted of this crime under subparagraphs (i) and (iii) or (i) and (iv) of paragraph (a) of this subdivision, the sentence of the court must be: (i) a fine of not less than five hundred dollars nor more than one thousand dollars; and either (ii) a term of imprisonment of not less than seven days nor more than one hundred eighty days, or (iii) where appropriate a sentence of probation as provided in subdivision six of this section.

3. Aggravated unlicensed operation of a motor vehicle in the first degree. (a) A person is guilty of the offense of aggravated unlicensed operation of a motor vehicle in the first degree when he: (i) commits the offense of aggravated unlicensed operation of a motor vehicle in the second degree as provided in subparagraphs (i) and (iii) or (i) and (iv) of paragraph (a) of subdivision two hereof; and

(ii) is operating a motor vehicle while under the influence of alcohol or a drug in violation of subdivision one, two, three, four or five of section eleven hundred ninety-two of this chapter.

(b) Aggravated unlicensed operation of a motor vehicle in the first degree is a class E felony. When a person is convicted of this crime, the sentence of the court must be: (i) a fine as provided in the penal law, but in an amount not less than five hundred dollars; and either (ii) a term of imprisonment as provided in the penal law, or (iii) where appropriate and a term of imprisonment is not required by the penal law, a sentence of probation as provided in subdivision six of this section . . . .

§ 1120. Drive on right side of roadway; exceptions

(a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

2. When overtaking or passing pedestrians, animals or obstructions on the right half of the roadway;

3. When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right of way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;

4. Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or

5. Upon a roadway restricted to one-way traffic.

(b) In addition, upon all roadways, any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.

(c) Upon any roadway having four or more lanes for moving traffic and providing for two way movement of traffic, no vehicle shall be driven to the left of the center line of the roadway, except when authorized by signs or markings designating certain lanes to the left side of the center of the roadway for use by traffic not otherwise permitted to use such lanes, or except as permitted under subsection (a)(2) hereof.

§ 1192. Operating a motor vehicle while under the influence of alcohol or drugs . . . .

2. No person shall operate a motor vehicle while he has .10 of one percentum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.

3. No person shall operate a motor vehicle while he is in an intoxicated condition. . . .

§ 1196. Conviction for different charge; limitations

1. A driver may be convicted of a violation of subdivision one, two or three of section eleven hundred ninety-two of this chapter, notwithstanding that the charge laid before the court alleged a violation of subdivision two or three of section eleven hundred ninety-two of this chapter, and regardless of whether or not such conviction is based on a plea of guilty. . . .

§ 1800. Penalties for traffic infractions

. . . (d) A conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an as-

sault or for a homicide committed by any person in operating a motor vehicle or motorcycle.

§ 2304. Constitutionality

If any part or parts of this chapter shall be held to be unconstitutional, such unconstitutionality shall not affect the validity of the remaining parts of this chapter. The legislature hereby declares that it would have passed the remaining parts of this chapter if it had known that such part or parts thereof would be declared unconstitutional.

Model Rules of Crim. Proc.:

Rule 471. [Joinder or Dismissal of Offenses upon Defendant's Motion.]

(a) Related offenses defined. Two or more offenses are related offenses, for the purposes of this Rule, if they are within the jurisdiction of the same court and are based on the same conduct or arise from the same criminal episode.

(b) Joinder of related offenses. Upon motion of the defendant conforming to Rule 451, the court shall join for trial two or more charges of related offenses, unless it determines that because the prosecuting attorney does not presently have sufficient evidence to warrant trying one or more of the charges, or for some other reason, the joinder would defeat the ends of justice.

(c) Dismissal of related offenses. Upon motion of the defendant conforming to Rule 451, the court shall dismiss a charge of an offense if the defendant was previously convicted or acquitted of a related offense, unless:

(1) The defendant knew he was charged with the offense by the time set by the court for making pretrial motions, but failed to move for joinder of the charges:

(2) A motion for joinder of the charges was previously denied; or

(3) The court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying the charge before the conviction or acquittal of the related offense, or for some other reason, the dismissal would defeat the ends of justice. . . .

Model Penal Code:

§1.07. Method of Prosecution When Conduct Constitutes More Than One Offense

. . . (2) Limitation on Separate Trials for Multiple Offenses. Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

§ 1.08. When Prosecution Barred by Former Prosecution for the Same Offense

When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances: . . .

(3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty accepted by the Court. In the latter two cases failure to enter judgment must be for a reason other than a motion of the defendant. . . .

§ 1.09. When Prosecution Barred by Former Prosecution for Different Offense

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is for:

(a) any offense of which the defendant could have been convicted on the first prosecution; or

(b) any offense for which the defendant should have been tried on the first prosecution under Section 1.07, unless the Court ordered a separate trial of the charge of such offense; or

(c) the same conduct, unless (i) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil, or (ii) the second offense was not consummated when the former trial began. . . .

Summary of Argument

1. Section 1800(d) of the New York Vehicle and Traffic Law is so patently unconstitutional in its attempt to eliminate convictions for lesser included offenses as grounds for former jeopardy in violation of long held interpretations of the Fifth Amendment by this Court, *In re Nielsen,* 131 US 176, 33 L.Ed. 118, 9 S.Ct. 672; *Brown v. Ohio,* 432 US 161, 53 L.Ed.2d 187, 97 S.Ct. 2221, that there is no need to relitigate the federal question.

2. The Court of Appeals' ruling that prior convictions for Driving While Intoxicated and Failure to Keep Right constitute a bar to subsequent prosecutions based on the same proof in New York follows the dictum of this Court in *Illinois v. Vitale,* 447 US 410, 65 L.Ed.2d 228, 100 S.Ct. 2260, and is so consonant with the results obtained throughout the states that there is no need for further pronouncement by this Court.

POINT I.

Section 1800(d) of the New York State Vehicle and Traffic Law is void

As set forth in the statutes, the New York Penal Law is replete with lesser included offenses in assault and homicide which are Vehicle and Traffic Law violations. Among these lesser included vehicle and traffic offenses are the following:

(a) Vehicular Manslaughter in the Second Degree (Penal Law section 125.12(2)) which includes Driving While Intoxicated (Vehicle and Traffic Law section 1192));

(b) Vehicular Manslaughter in the First Degree (Penal Law section 125.13) which not only includes Vehicular Manslaughter in the Second Degree but also Driving (knowingly) with License Suspended or Revoked (Vehicle and Traffic Law section 511);

(c) Vehicular Assault in the Second Degree (Penal Law section 120.03) which includes Driving While Intoxicated (Vehicle and Traffic Law section 1192); and

(d) Vehicular Assault in the First Degree which adds also knowingly Driving While License is Suspended or Revoked under certain conditions. (Penal Law section 120.04.)

Section 1800(d) by its terms purports to cancel the constitutional bar against double jeopardy with respect to such vehicle and traffic offenses including the convictions for Driving While Intoxicated and Failure to Keep Right which obtain in this case.

There can be no doubt that the draftsmen of section 1800(d) intended that persons convicted of such lesser included offenses be stripped of the constitutional safeguard. Nor is there any doubt that such legislation flies in the face of the Fifth Amendment as it has long been interpreted by this Court.

> *Whatever the sequence may be,* the Fifth Amendment forbids successive prosecutions and cumulative punishment for a greater and lesser included offense. (*Brown v. Ohio,* 432 US 161, 169 (Emphasis added)

In *Brown,* the Supreme Court was divided on a number of issues. Some dissented as to whether the conviction for the lesser included offense of joy riding was based on conduct which took place at a different time than the conduct for which the appellant was subsequently charged, i.e.: auto theft. Moreover, other Justices concurred but wished the Court to adopt the "criminal transaction" test. (See, Model Rules of Criminal Procedure Rule 471; See also, New York Criminal Procedure Law sections 40.10, 40.20). Nevertheless, the Court was unanimous on the issue which controls this application. They agreed that persons convicted of lesser included offenses were entitled to the constitutional protection against double jeopardy and that that was the understanding of the Supreme Court since *In re Nielsen,* 131 US 176, 33 L.Ed. 118, 9 S.Ct. 672, decided in 1889.

Nielsen was convicted in Utah Territories for the lesser included misdemeanor of Cohabitation with More Than One Woman. The Supreme Court held that the conviction was a bar to subsequent prosecution for the felony of Adultery (with the same women.) In addition, the Court in *Brown* was quite clear in ruling that prior convictions

for lesser included offenses qualified fully as constitutional bars under the statutory analysis adopted by this Court in *Blockburger v. United States,* 284 US 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), of "whether each provision requires proof of an additional fact which the other does not." *Id.* at 304, 52 S.Ct. at 182.

Respondent submits that any reasonable interpretation of the single sentence of section 1800(d) violates the Constitution. Furthermore, the New York State legislature clearly had the threat of unconstitutionality in mind when they also enacted section 2304 of the Vehicle and Traffic Law maintaining the validity of the remaining parts of the Chapter (the entire Vehicle and Traffic Law) in the event of a declaration of unconstitutionality of a part thereof (as in this case). In other words, the draftsmen, by use of a "severability" clause, have wisely ensured that administration of the overwhelmingly valid remaining portions of the Vehicle and Traffic Law would go on unmolested by any result in this case. (See, *Alaska Airlines Inc. v. Brock,* 94 L.Ed.2d 661, 107 S.Ct. 1476, 1481 (1987)). Under such circumstances of legislative intent, respondent urges that section 1800(d) is void as if it had never been enacted. (See, *Norton v. Shelby County,* 118 US 425, 442, 30 L.Ed. 178, 6 S.Ct. 1121; *Ex parte Siebert,* 100 US 371, 376, 25 L.Ed. 717, 719).

It is interesting that this is not the first time section 1800(d) was scrutinized unfavorably by the New York courts. In *Matter of Martinis,* 15 NY2d 240, on remand *sub nom., People v. Martinis,* 46 Misc.2d 1066, affd. 25 AD2d 620, the Court of Appeals was confronted with a situation where an acquittal of the Vehicle and Traffic Law charge of Reckless Driving was interposed as a bar to an indictment for Vehicular Manslaughter. Three judges voted to issue a writ of prohibition and three upheld section 1800(d). The fourth, Judge Adrian Burke, ruled that there was insufficient showing of proof used in support of the Indictment so that the case was sent to trial. Upon a non-jury trial, the justice presiding found proof identical and dismissed the charge upon the grounds of double jeopardy. He was affirmed by the intermediate court so that the clear implication is section 1800(d) was inoperative as of 1965.

Subsequently in 1970, Article 40 of Criminal Procedure Law was enacted whose safeguards would be expected to obviate the problems raised in this case as well as the *Martinis* case.

This is particularly so since section 1800(d) not only contradicts the Constitution of the United States (and presumably N.Y. Const. art. I, section 6) but it is in flat contradiction with Article 40 of the New York Criminal Procedure Law which takes the "criminal transaction" approach to prosecutions requiring "joinder" of charges which involve different proof arising from the same transaction (Criminal Procedure Law section 40.40) as well as barring successive prosecutions based on the same acts unless the elements of the charges are not only disparate but intended to redress very different kinds of harm or evil (except under circumstances which are not relevant to this application). (Criminal Procedure Law section 40.20).

These broad protective provisions (which come into play once section 1800(d) is voided) obviate the need for entertaining any further federal questions in this case since it is quite clear that their employment in this case can only result in a result favorable to respondent. (See, *e.g., People v. Thompson,* 136 Misc.2d 740, 744-5).

Accordingly, respondent takes the position that the voiding of section 1800(d), a rare statutory clause, unique in its blatant violation of the Fifth Amendment, is based on precedent of such ancient and continuous vintage that no conflicts between courts or issues of public importance are involved.

POINT II.

The Court of Appeals ruling is based on well established precedent

The Court of Appeals, as is its prerogative in New York practice, determined that the District Attorney relies on Driving While Intoxicated and Failure to Keep Right as the acts necessary to prove the Homicide and Assault counts of the Indictment. This places the case squarely under the dictum of *Illinois v. Vitale,* 447 US 410, 65 L.Ed.2d 228, 100 S.Ct. 2260, that this respondent has "a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution." *Id.* at 2267, 447 US at 422. The only dispositive distinction between this case and *Vitale* is that the pleadings under New York practice removed any doubt as to the acts the State relies upon to establish a conviction under the statutes.

Furthermore, the result in this case tracks the vast majority of jurisdictions which have passed upon the question whether a conviction for driving while intoxicated or other type of traffic offense furnished prior jeopardy so as to bar subsequent prosecutions for homicide or assault arising out of the same accident.

There are the jurisdictions such as New Jersey and Pennsylvania which have adopted sections 107(2), 108(3), and 109(1) of the Model Penal Code which not only create a bar of jeopardy out of convictions for offenses arising out of the same "criminal transaction" but also require the prosecutor to join in one prosecution all charges supportable by facts of which he has knowledge. (See, *e.g., State v. Dively,* 92 NJ 573, 458 A2d 502 (N.J., 1983); *Commonwealth v. Compana,* 455 Pa 622, 314 A2d 854, cert. denied 417 US 969, 41 L.Ed.2d 1139, 94 S.Ct. 3172).

Examples of additional jurisdictions are Texas (See, *e.g., Herrera v. State,* 756 SW2d 120 (Tex. App.-Fort Worth 1988); *Cervantes v. State,* 742 SW2d 768 (Tex. App.-San Antonio 1987); *May v. State,* 726 SW2d 573 (Tex. Cr. App., 1987); *Ex Parte Peterson,* 738 SW2d 688 (Tex. Crim. App., 1987)); Michigan (See, *e.g., People v. White,* 390 Mich. 245, 212 NW2d 222); Florida (See, *e.g., Sanford v. State,* 75 Fla. 393, 78 So. 340); North Carolina (See, *e.g., State v. Griffin,* 51 N.C.App. 564, 277 SE2d 77); and Connecticut (See, *e.g., State v. Lonergan,* 16 Conn.App. 358, 548 A2d 718) which have considered the question whether a subsequent prosecution based upon the same precise conduct and relying upon the same proof is barred. Their conclusions in favor of the bar of double jeopardy are soundly grounded not only in the need to protect citizens from serial prosecution but in sound practical consideration against the proliferation of litigation and in favor of consolidation of all the issues in one tribunal. The disappointment felt by prosecutors of not having "two bites at the apple" is no ground to gainsay these principles.[1]

Petitioner relies on *United States v. Brooklier,* 637 F2d 620, 623-4, cert. denied 450 US 980, 101 S.Ct. 1514, 67 L.Ed.2d 815 (1981), as an example of a Court confused between *Vitale* and *Blockburger*. Actually, the Circuit Court simply held that the Supreme Court has not fully adopted the "criminal transaction" approach as a constitutional bar to federal prosecutions. *People v. Jackson,* 118 Ill2d 179, 514 NE2d 983, can be explained by the peculiar differences which apply to charges which can be levied by police in Illinois, uniform traffic citation and

[1]Respondent trusts that this Court will pay no heed to the calumny asserted against defense counsel apparently as an attempted counter-weight to criticism of petitioner District Attorney's conduct of this case.

complaint forms, although it appears that the construction of the laws of Illinois as to lesser included offenses is more restrictive than ever contemplated by the Supreme Court in *Blockburger*. The same observation applies with greater vigor to the decision in *State v. Seats,* 131 Ariz. 89, 638 P2d 1335.

Conclusion

The application for a writ of certiorari should be denied, with costs.

Respectfully submitted,

CARL S. WOLFSON
STEPHEN L. GRELLER
CRANE, WOLFSON, ROBERTS
& GRELLER
Attorneys for Respondent
11 Market Street
Poughkeepsie, NY 12601
(914) 454-2200

No. 89-474

IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM V. GRADY, DISTRICT ATTORNEY OF DUTCHESS COUNTY,

Petitioner,

vs.

THOMAS J. CORBIN,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

JOINT APPENDIX

WILLIAM V. GRADY*
District Attorney of Dutchess County
Courthouse
10 Market Street
Poughkeepsie, NY 12601
(914) 431-1940
Petitioner, Pro Se

STEPHEN L. GRELLER*
CRANE, WOLFSON, ROBERTS & GRELLER
11 Market Street
Poughkeepsie, NY 12601
(914) 454-2200
Counsel for Respondent

*Counsel of Record

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1989
CERTIORARI GRANTED NOVEMBER 6, 1989

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1989
(3580)

Table of Contents.

[1] *See* Appendix to the Petition for a Writ of Certiorari at 1 c.
[2] *See* Appendix to the Petition for a Writ of Certiorari at 1 b.
[3] *See* Appendix to the Petition for a Writ of Certiorari at 1 a.

CHRONOLOGICAL LIST OF RELEVANT PLEADINGS, HEARINGS AND ORDERS

1. October 7, 1987—Simplified Traffic Informations issued to defendant Thomas J. Corbin on October 3, 1987, filed in Town Court, Town of LaGrange, Dutchess County, New York

2. October 14, 1987—Statement of Readiness, Notice of Intention to Introduce Statement of Defendant, Supporting Deposition, DWI Foundation Report

3. October 27, 1987—Defendant Thomas J. Corbin arraigned and guilty pleas accepted in the Town Court, Town of LaGrange.

4. November 17, 1987—Defendant Thomas J. Corbin sentenced in Town Court, Town of LaGrange.

5. January 29, 1988—Dutchess County Indictment #6/88 filed in County Court, Dutchess County.

6. February 5, 1988—Defendant Thomas J. Corbin arraigned on Indictment #6/88 by County Court of Dutchess County; Bill of Particulars served and filed.

7. April 4, 1988--Defendant Corbin's Omnibus Motion filed.

8. June 29, 1988—Order of County Court entered deciding Omnibus Motion in part, and ordering a hearing.

9. August 12, 1988—Hearing commenced.

10. August 15, 1988—Hearing concluded.

11. August 18, 1988—Opinion of County Court denying the Motion to Dismiss the Indictment.

12. August 19, 1988—Petition of Thomas J. Corbin seeking relief pursuant to N.Y.CPLR Article 78 in the nature of prohibition filed in New York State Supreme Court, Appellate Division, Second Judicial Department.

13. October 26, 1988—Decision and Order of Appellate Division entered dismissing the petition.

14. December 7, 1988 Notice of Appeal filed.

15. July 13, 1989—Opinion and Order of the New York State Court of Appeals.

16. November 6, 1989—Order of the Supreme Court of the United States granting Petition for a Writ of Certiorari.

Simplified Traffic Informations.

UT-3.5 (10/85) State of New York • Department of Motor Vehicles

UNIFORM TRAFFIC TICKET

TF 864825 3

Police Agency: DCSO

Last Name: Corbin — First Name: Thomas — M.I.: J

Number and Street: 32 Wadewater Dr

City: Wapp Falls — State: NY — Zip Code: 12590

Client ID Number: C75 660 107854 637808 143

Sex: M — Date of Birth: 12 23 42

Plate Number: 7PR 678 — Reg. State: NY — Reg. Type: Pas — Color: bl — Veh. Type: 1

Vehicle Year/Make: 82 Chev.

In connection with your alleged commission of the following offense committed on

Weekday: Sat — Date of Offense: 10 03 87 — Time AT 8:00 PM

ON: Rte 55 — Hwy. No.: 55

IN Town OF Lagrange CO. OF Dutc

IN VIOLATION OF: V&T Law — Sec. 1192 Sub. 3 — Other Law

Description of Violation: DWI

Speeding: MPH ___ MPH Zone

Officer's Signature: R A Monaco — 10 03 87

NCIC/ORI: 01300 — DIV/Troop — PCT/Zone — Sector/Station

Officer's Last Name (print): Monaco — F.I.: R — M.I.: A — Badge/Shield: 093

YOU ARE HEREBY DIRECTED TO APPEAR IN THE

City/Town/Village COURT OF Lagrange

Address: Town Hall Stringham Rd

Lagrangeville NY 12540

ON Oct 29 19 87 AT 7:00 PM

TF 864825

A PLEA OF GUILTY TO THIS CHARGE IS EQUIVALENT TO A CONVICTION AFTER TRIAL. IF YOU ARE CONVICTED, NOT ONLY WILL YOU BE LIABLE TO A PENALTY, BUT IN ADDITION YOUR LICENSE TO DRIVE A MOTOR VEHICLE OR MOTORCYCLE, AND YOUR CERTIFICATE OF REGISTRATION, IF ANY, ARE SUBJECT TO SUSPENSION AND REVOCATION AS PRESCRIBED BY LAW.

Upon conviction you may be subject to a mandatory surcharge in the amount prescribed by law.

Your failure to respond may result in a warrant for your arrest or suspension of your driver license.

UT-3.5 (10/85) State of New York • Department of Motor Vehicles

UNIFORM TRAFFIC TICKET

TF 864047

In connection with your alleged commission of the following offense committed on

SA 10 03 87 AT 6:55 PM

ON Rt 55 — Hwy. Type 2 — Hwy. No. 55

IN CITY OF LAGRANGE CO. OF DUTC 1457

IN VIOLATION OF NYS V&T Law 1120 A

Description of Violation: FAILURE TO KEEP RIGHT

Officer's Signature

10 03 87

NOC/ORI 013000

Officer's Last Name (print) WILLIAMS

YOU ARE HEREBY DIRECTED TO APPEAR IN THE

Town COURT TOWN OF LAGRANGE

Address STRINGHAM RD

City LAGRANGEVILLE NY

ON 10-29 19 87 AT 7:30 PM

A PLEA OF GUILTY TO THIS CHARGE IS EQUIVALENT TO A CONVICTION AFTER TRIAL. IF YOU ARE CONVICTED, NOT ONLY WILL YOU BE LIABLE TO A PENALTY, BUT IN ADDITION YOUR LICENSE TO DRIVE A MOTOR VEHICLE OR MOTORCYCLE, AND YOUR CERTIFICATE OF REGISTRATION, IF ANY, ARE SUBJECT TO SUSPENSION AND REVOCATION AS PRESCRIBED BY LAW.

Upon conviction you may be subject to a mandatory surcharge in the amount prescribed by law.

Your failure to respond may result in a warrant for your arrest or suspension of your driver license.

TF 864047

Statement of Readiness, Notice of Intention to Introduce Statement of Defendant, DWI Investigative Report, Supporting Deposition, DWI Foundation Report.

Statement of Readiness

STATE OF NEW YORK : DUTCHESS COUNTY

JUSTICE COURT : TOWN OF LAGRANGE

THE PEOPLE OF THE STATE OF NEW YORK

against

THOMAS J. CORBIN,

Defendant.

PLEASE TAKE NOTICE that pursuant to Section 30.30 of the Criminal Procedure Law, the People indicate their readiness for trial in the above-captioned case.

Dated: October 14, 1987
Poughkeepsie, NY

Yours, etc.

WILLIAM V. GRADY
Dutchess County
District Attorney
By: MARK H. GLICK
Asst. District Attorney
Courthouse
10 Market Street
Poughkeepsie, NY 12601

710.30 Notice

STATE OF NEW YORK : DUTCHESS COUNTY

JUSTICE COURT : TOWN OF LAGRANGE

THE PEOPLE OF THE STATE OF NEW YORK

against

THOMAS J. CORBIN,

Defendant.

PLEASE TAKE NOTICE pursuant to Section 710.30 of the Criminal Procedure Law, that during the trial at the above-named matter, the People intend to offer evidence of a statement made by the defendant to a public servant.

The following attached documents contain the statements, along with the circumstances surrounding the time the statements were made, which the People intend to offer:

DWI Investigative Report

Physicial Condition Report

X Supporting Deposition

Huntly Notice and Supporting Deposition

X DWI Foundation Report

Other

Dated: October 14, 1987

Yours, etc.

WILLIAM V. GRADY
Dutchess County Dist. Attorney
By: MARK H. GLICK
Assistant District Attorney
Courthouse
10 Market Street
Poughkeepsie, NY 12601

DWI INVESTIGATIVE REPORT

DUTCHESS COUNTY, N.Y.

ARREST DATA

Defendant's Name: Thomas J. Corbin | Sex: M | Race: W | Age: 43 | D.O.B.: 12/13/43 | Agency Case Number: 22955-87

Address: 34 Vanderwater D. Wapp Falls, NY | Phone: 462-1931

Employer: | Occupation: | Phone:

Parents' name, address and phone (Under 18 only):

Location of offense On: Rte 55 | CC OV TOf: LaGrange

Date of Offense: 10/03/87 | Time: 6:35 ☐AM ☑PM | ☑Weekend ☐Holiday | Day of Week: SU MO TU WE TH FR (SA)

PRINCIPAL OFFENSE CHARGED: ☐ 1192(2) ☑ 1192(3) ☐ Misd. ☐ Felony ☐ D.W.A.I. 1192(1) ☐ D.W.A.I. (Drugs) 1192(4)

All other offenses charged: 1120 A

Alco-sensor test: ☐ Refused ☐ Not Necessary ☑ Used Positive Time: 7:55 PM

Chemical Test Information: ☐ Refused ☐ Breath ☑ Blood ☐ Urine Time: 8:25 PM Result: ____ %BAC

BREATH TEST: Operator ____ Location: ____ Inst. # ____ Model # ____ Amp. # ____ Sim. Lot # ____

BLOOD TEST: Administered by: Susan Steambach | Time of Test: 8:25 PM | Hospital: St Francis | City/Town: Poughkeepsie | ☑ Phys. ☐ M.D. ☐ Lab. Tec.
Witnesses to test: Deputy RA Monaco

Vehicle Operation Shown by: ☐ Officer's direct observation ☑ Admissions by defendant | Name & address of witness(es):

☐ Circumstantial ☑ (Fill in Page 2) ☑ Defendant at wheel ☐ Motor Running ☑ Keys in Ignition
☐ Defendant injured in crash ☐ Defendant only one at scene ☐ Other
Number of persons in car

☐ Arraigned ☐ Pre-arraignment bail posted ☑ Released to: ROR

ARRESTING OFFICER PRINT: Deputy RA Monaco | SIGNATURE: RA Monaco | AGENCY: DCSO

Time of Arrest: 8:00 PM | Location: St Francis Hospital
Def. Rights: 8:00 PM | Location: St. Francis Hospital
Miranda Warnings: 8:30 PM | Location: St Francis Hospital

JUDICIAL DATA

JUDGE: | COURT:

Date of Arraignment: | Bail: ☐ No, R.O.R. ☐ Yes, amount $ ☐ Remand | Suspended by the court at arraignment ☐ Yes ☐ No ☐ N/A

Attorney:

Proceedings: ☐ Guilty plea at arraignment ☐ Bench trial Verdict: ☐ Dismissed (explain): ☐ Guilty Plea at other stage ☐ Jury Trial

Disposition and/or sentence of the Court:

Probation ____ years Jail ____ Intermittent Jail ____ Fine ____ U.D.

Other (explain): ____ Conditional Discharge

Special conditions of probation or conditional discharge:

RECEIVED
OCT 8 1987
District Attorney's Office
DUTCHESS COUNTY, N.Y.

SUPPORTING DEPOSITION

To Support Simplified Traffic Information — (1192 Cases)

State of New York
Court of Dutchess

County of Dutchess

People of the State of New York

UTT # TF 864825-3

—against—

Thomas J. Corbin

P.O. RA Monaco, as and for a supporting deposition as prescribed by Section 100.25 (2) of the Criminal Procedure Law, for the Simplified Traffic Information(s) sworn to and filed against the above-named defendant on the 3 day of October, 19 87, and charging said defendant with a violation of Section 1192-3, of the Vehicle and Traffic Law of the State of New York does hereby furnish the following factual allegations.

(1) The violation charged herein was committed by the above-named at approximately 6:35pm on the 3 day of October, 19 87.

(2) The aforesaid violation was committed on Rte 55 in the City, Town, Village of Lagrange, County of Dutchess and State of New York.

(3) The above-named defendant, at the aforesaid time and place, was operating a 1987 Chevrolet bearing registration 8VYR-678 of the State of New York.

(4) The source of your deponent's allegation with regard to operation of the motor vehicle is based upon direct knowledge or information and belief. (If based upon latter state basis.)

(5) In support of your deponent's allegation with regard to the intoxication of the defendant, your deponent made the following observations: Strong odor of alcoholic beverage on breath, Red blood shot eyes and slurred speech.

(6) The source of your deponent's allegations regarding the intoxication of the defendant is based upon direct knowledge or information and belief. (If based upon latter state basis.)

FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A MISDEMEANOR PURSUANT TO SECTIONS 210.45 OF THE PENAL LAW.

DATE: 10/03/87
AGENCY: DCSO
DUTCHESS COUNTY, N.Y.

RA Monaco
OFFICER'S SIGNATURE

DWI FOUNDATION REPORT

DUTCHESS COUNTY, N.Y.

1. REASON FOR STOP:
   - ☐ ERRATIC OPERATION (DESCRIBE) _____
   - ☐ OTHER _____
   - ☐ VTL VIOLATION OF SECTION(S) _____
   - ☑ ACCIDENT ☐ ONE CAR ☐ TWO CARS OR MORE ☐ PROPERTY DAMAGE ☐ PERSONAL INJURY ☑ SERIOUS P.I. ☐ FATALITY
   - ☐ CIVILIAN COMPLAINT ☐ SOBRIETY CHECKPOINT

2. ROAD CONDITIONS: TRAFFIC: Moderate WEATHER: Rain

3. PROBABLE CAUSE FOR ARREST:
   OBSERVATIONS OF THE DEFENDANT:
   - ☑ DRIVING
   - ☑ ODOR OF ALCOHOLIC BEVERAGE ☑ STRONG ☐ MODERATE ☐ LIGHT
   - ☑ EYES ☐ BLOODSHOT ☐ WATERY ☐ GLASSY ☑ SLURRED SPEECH ☐ SWAYING WHILE STANDING
   - ☐ STAGGERED WHILE WALKING ☐ OTHER (DESCRIBE) _____

   PERFORMANCE FIELD SOBRIETY TEST FAILED: (DESCRIBE HOW TEST WAS FAILED)
   - ☐ RECITING THE ALPHABET _____
   - ☐ FINGER TO NOSE _____
   - ☐ ONE-LEG STAND _____
   - ☐ WALK AND TURN _____
   - ☐ HORIZONTAL GAZE NYSTAGMUS _____
   - ☑ OTHER Unable to perform any field tests due to medical injury

   OTHER FACTORS:
   - ☐ OPEN CONTAINER OF AN ALCOHOLIC BEVERAGE IN OR NEAR VEHICLE
   - ☑ POSITIVE ALCO-SENSOR ☐ CIVILIAN WITNESS' OBSERVATION
   - ☐ OTHER (DESCRIBE) _____

4. STATEMENTS OF THE DEFENDANT:
   AT THE SCENE: _____
   BEFORE MIRANDA: Subject stated that he had been drinking
   AFTER MIRANDA: none

OTHER ADMISSIONS NOT INCLUDED ON HUNTLEY NOTICE: _____

SUMMATION: blood drawn @ St. Francis Hospital.

OTHER COMMENTS: Subject involved in a 3 car accident PI

Town Court Notes.

TOWN OF LA GRANGE

JUSTICE COURT

10/7/87 Sent copy to ADA Heidi Sauter

10/27/87 Thomas Corbin was present with his attorney, Mark Reisman before Judge Caplicki.

Judge: Waive formal arraignment?
Atty: Yes. My client would like to plea guilty.
Judge: Have you contacted ADA's office?
Atty: Yes. We have received papers. We have also discussed this matter with Mr. Corbin.
Judge: I appreciate your willingness to remove this matter from the calendar as quickly as possible, but I cannot set the sentence until DA night. I can accept the plea. It is my understanding that you wish to enter a plea of guilty?
Def: Yes
Judge: You are pleading voluntarily?
Def: Yes
Judge: Nobody is forcing you to plea?
Def: No
Judge: You have discussed this matter with your attorney and is satisfied with him?
Def: Yes
Judge: Read charges and given a test?
Def: Yes
Judge: You are pleading guilty to Failure to Keep Right also?
Def: Yes
Judge: Adjourn sentencing to 11/17/87. Be back that evening.

11/17/87 Thomas Corbin was present with his attorney, Mark Reisman before Judge Caplicki and ADA Heidi Sauter.

Atty: My client is willing to plea guilty and I request minimum sentence.

Judge: Read charges. We will accept your plea of guilty. Any recommendation on sentence?

Atty: Minimum sentence

Judge: The fine will be $350 and $10 surcharge. Your license will be revoked for six months and you will be given a 20 day license. You can also attend the Article 21 school if you are eligible and must successfully complete the course.

Indictment.

STATE OF NEW YORK

COUNTY COURT : DUTCHESS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

against

THOMAS J. CORBIN

Indictment #6/88

Dated the 19th day of January, 1988

THE GRAND JURY OF THE COUNTY OF DUTCHESS, by this Indictment, accuses THOMAS J. CORBIN of the crime of MANSLAUGHTER IN THE SECOND DEGREE, A CLASS C FELONY, in violation of Section 125.15, subdivision 1 of the Penal Law of the State of New York, committed as follows:

The said defendant, in the Town of LaGrange, County of Dutchess and State of New York, on or about the 3rd day of October, 1987, recklessly caused the death of another person, to wit: Brenda Dirago.

SECOND COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses THOMAS J. CORBIN of the crime of VEHICULAR MANSLAUGHTER IN THE SECOND DEGREE; A CLASS D

FELONY, in violation of Section 125.12, subdivisions 1 and 2 of the Penal Law of the State of New York, committed as follows:

The said defendant, in the Town of LaGrange, County of Dutchess and State of New York, on or about the 3rd day of October, 1987, with criminal negligence caused the death of another person, to wit: Brenda Dirago, and caused the death of such person, by operating a motor vehicle on a public highway while he had more than .10 of one percentum by weight of alcohol in his blood.

THIRD COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses THOMAS J. CORBIN of the crime of VEHICULAR MANSLAUGHTER IN THE SECOND DEGREE, A CLASS D FELONY, in violation of Section 125.12, subdivisions 1 and 2 of the Penal Law of the State of New York, committed as follows:

The said defendant, in the Town of LaGrange, County of Dutchess and State of New York, on or about the 3rd day of October, 1987, with criminal negligence caused the death of another person, to wit: Brenda Dirago and caused the death of such person by operating a motor vehicle on a public highway while in an intoxicated condition.

FOURTH COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses THOMAS J. CORBIN of the crime of CRIMINALLY NEGLIGENT HOMICIDE, A CLASS E FELONY, in violation of Section 125.10 of the Penal Law of the State of New York, committed as follows:

The said defendant, in the Town of LaGrange, County of Dutchess and State of New York, on or about the 3rd day of October, 1987, with criminal negligence caused the death of another person, to wit: Brenda Dirago.

FIFTH COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses THOMAS J. CORBIN of the crime of ASSAULT IN THE THIRD DEGREE, A CLASS A MISDEMEANOR, in violation of Section 120.00, subdivision 2 of the Penal Law of the State of New York, committed as follows:

The said defendant, in the Town of LaGrange, County of Dutchess and State of New York, on or about the 3rd day of October, 1987, recklessly caused physical injury to another person, to wit: Daniel Dirago.

SIXTH COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses THOMAS J. CORBIN of the crime of OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, A CLASS A MISDEMEANOR, in violation of Section 1192, subdivision 2 of the Vehicle and Traffic Law of the State of New York, committed as follows:

The said defendant, in the Town of LaGrange, County of Dutchess and State of New York, on or about the 3rd day of October, 1987, operated a motor vehicle on a public highway while he had more than .10 of one percentum by weight of alcohol in his blood.

SEVENTH COUNT

AND THE GRAND JURY AFORESAID, by this Indictment, further accuses THOMAS J. CORBIN of the crime of OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, A CLASS A MISDEMEANOR, in violation of Section 1192, subdivision 3 of the Vehicle and Traffic Law of the State of New York, committed as follows:

The said defendant, in the Town of LaGrange, County of Dutchess and State of New York, on or about the 3rd day of October, 1987, operated a motor vehicle on a public highway while he was in an intoxicated condition.

WILLIAM V. GRADY
District Attorney

A TRUE BILL

PEI TSAI
Foreman of the Grand Jury
First Term—1988

PEOPLE V. THOMAS J. CORBIN

ALIBI DEMAND
L. 1974, ch. 420
CPL Section 250.20

PLEASE TAKE NOTICE, that if you or any of you intends to offer a trial defense, that at the time of the commission of the crime or crimes charged you were at some place or places other than the scene of the crime or crimes, and to call witnesses in support of such defense, you must, within eight (8) days from the date of service hereof, serve upon the District Attorney of Dutchess County, and file a copy thereof with the Court, a "Notice of Alibi" reciting:

a) The place or places where you claim to have been at the time of the commission of the alleged crime or crimes.

b) The names, the residential addresses, the places of employment, and the addresses thereof, of every such alibi witness upon whom you intend to rely.

PLEASE TAKE FURTHER NOTICE, that if at trial you call such an alibi witness without having served the demanded Notice of Alibi, or if having served such a notice you call a witness not specified therein, the People will move to exclude any testimony of such witness relating to the alibi defense.

Yours, etc.,

WILLIAM V. GRADY
Dutchess County District Attorney
10 Market Street
Poughkeepsie, New York 12601

DA-84R

Bill of Particulars.

STATE OF NEW YORK

COUNTY COURT : DUTCHESS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

against

THOMAS J. CORBIN

Ind. #6/86

The Plaintiff, as and for its Bill of Particulars, alleges:

As to All Counts of the Indictment:

A. The date when the crime was committed was on or about the 3rd day of October, 1987.

B. The time when the crime was committed was in the evening hours, more particularly between 6:00 p.m. and midnight.

C. The place where the crime was committed was in the Town of LaGrange, County of Dutchess and State of New York, more particularly on Route 55, approximately a quarter of a mile east of the Redl's Salvage Yard.

Substance of Defendant's Conduct as to All Counts of the Indictment

On October 3, 1987, at approximately 6:35 p.m., the defendant was operating his 1987 Chevrolet motor vehicle in a westerly direction on Route 55 in the Town of LaGrange, County of Dutchess and State of New York. At about that time, the defendant drove his vehicle across the median of the highway into the eastbound lane of Route 55 and struck the rear view mirror of an eastbound vehicle. He continued in the eastbound lane and struck a 1986 Buick Sentry sedan operated by Brenda Dirago and occupied by her husband, Daniel Dirago. At the time of the impact, the left front side of the defendant's vehicle was approximately nine feet to the left of the median or center portion of Route 55, that is, the left front of the defendant's vehicle was nine feet into the eastbound lane of Route 55. The left front of the defendant's vehicle struck the left front of the Dirago vehicle with an approximate overlap of two feet. As a result of this collision the Buick was driven in a lateral manner toward the south and came to rest on the southern shoulder of Route 55 adjacent to the point of impact. The defendant's vehicle continued for a distance of approximately twenty feet rotating in a counter clockwise motion and coming to rest astride the median of the highway. At the time of the impact, the defendant was driving at a speed of approximately forty-five to fifty miles an hour. A moderate to hard rainfall was occurring at the time of the collision. As a result of the impact, Brenda Dirago suffered massive head injuries and was removed from the scene by ambulance to Vassar Brothers Hospital where, as a result of those injuries, she died later the same evening. As a result of this collision, Daniel Dirago suffered facial lacerations which required suturing, a fractured nose and contusions to his torso and left arm. The defendant, Thomas Corbin was also injured in the collision and was removed to St. Francis

Hospital in Poughkeepsie, New York. After treatment at St. Francis Hospital, he was observed by the arresting officer to have a strong odor of alcoholic beverage on his breath, which confirmed the observations of additional officers initially at the scene, red bloodshot eyes and slurred speech. The defendant admitted to the arresting officer that he had been drinking and a prescreen alco-sensor test was positive for the presence of alcohol. Defendant was thereafter arrested for Driving While Intoxicated and consented to a withdrawal of his blood for additional testing. The results of that examination revealed the defendant to have a .19 percent by weight of alcohol in his blood. Based upon the foregoing, it is apparent that the defendant operated a motor vehicle on a public highway in an intoxicated condition having more than .10 percent of alcohol content in his blood, that he failed to keep right and in fact crossed nine feet over the median of the highway while driving at approximately forty-five to fifty miles an hour in heavy rain, which was a speed too fast for the weather and road conditions then pending and struck the vehicle owned and operated by the victims head on which resulted in injuries to Daniel Dirago and, initially, injuries to Brenda Dirago and her later death. By so operating his vehicle in the manner above described, the defendant was aware of and consciously disregarded a substantial and unjustifiable risk of the likelihood of the result which occurred. This risk was of such nature and degree that disregard thereof was a gross deviation from the standard of care he should have exercised in this situation. It is equally clear that the defendant failed to perceive a substantial and unjustifiable risk that this result would occur. By his failure to perceive this risk while operating a vehicle in a criminally negligent and

reckless manner, he caused physical injury to Daniel Dirago and the death of his wife, Brenda Dirago.

Dated: January 25, 1988
Poughkeepsie, New York

WILLIAM V. GRADY
Dutchess County District Attorney
Court House
10 Market Street
Poughkeepsie, New York 12601

Defendant['s] Notice of Omnibus Motion.

COUNTY COURT OF THE STATE OF NEW YORK

COUNTY OF DUTCHESS

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

against

THOMAS J. CORBIN,

Defendant.

Ind. No. 6/88

SIRS:

PLEASE TAKE NOTICE that upon the annexed affirmation of STEPHEN L. GRELLER, affirmed the 31st day of March, 1988, the Affidavit of THOMAS J. CORBIN, sworn to the 31st day of March, 1988, the Indictment No. 6/1988, and upon all the prior pleadings and proceedings heretofore had herein, the defendant will move this Court, at a Term thereof, to be held in and for the County of Dutchess, at the Courthouse located at 10 Market Street, Poughkeepsie, New York, on the 4th day of April, 1988, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order:

1. Pursuant to Article 40 of the Criminal Procedure Law dismissing each and every count of the Indictment on the grounds that same are barred in that this prosecution is exempt by reason of previous prosecution; and for a further

2. Pursuant to Criminal Procedure Law Section 210.30(2) requesting that the Court examine the stenographic minutes of the Grand Jury proceeding resulting in the instant Indictment, together with the charge made thereto for the purpose of determining whether the evidence before the Grand Jury was legally sufficient to support the charges contained in the Indictment; and upon such inspection for a further Order dismissing said Indictment on the grounds that the evidence submitted to the Grand Jury was not legally sufficient to establish the commission by the defendant of the crimes charged or any lesser included offense and that the same is insufficient as a matter of law to accuse the defendant of the felonies as set forth in the Indictment; that the evidence presented to the Grand Jury was otherwise insufficient and defective and that the charge presented was defective as a matter of law; and for a further

3. Pursuant to Criminal Procedure Law Section 210.30(2)(3) requiring the Court to disclose to the defendant: (a) Grand Jury testimony pertinent, relevant and germane to the count as set forth in the Indictment; (b) charge in its entirety, as well as all other portions of the Grand Jury minutes, together with all exhibits that shall be reviewed, read and viewed by the Court in making its decision pertaining to the sufficiency of the evidence presented; and for a further

4. Requiring the People, pursuant to Criminal Procedure Law Section 200.95, to file a Bill of Particulars setting forth the following:

a. The date, time and place of the occurrences alleged in the Indictment;

b. The substance of defendant's conduct as it pertains to the Indictment charging Manslaughter in the Second Degree and Vehicular Manslaughter in the Second Degree;

c. The substance of defendant's conduct as it pertains to the charge of Criminally Negligent Homicide;

d. All injuries allegedly sustained under the Fifth Count of the Indictment;

e. Each and every act, occurrence and physical condition in support of the contention that defendant was intoxicated as alleged in the Indictment;

5. Pursuant to Criminal Procedure Law Article 710 suppressing the use by the People of any and all statements, admissions, and confession allegedly made by the defendant to law enforcement officials as same were received in violation of defendant's constitutional rights; and for a further

6. Pursuant to Criminal Procedure Law Article 710 suppressing the use by the People of any and all physical evidence allegedly seized by the People on the grounds that any such seizure was not based upon probable cause and was otherwise violative of defendant's rights; and for a further

7. Suppressing the use by the People of any and all of defendant's previous convictions and prior bad acts; and for a further

8. Pursuant to *Brady v. Maryland* for the receipt of all exculpatory materials in the possession of the People or known, by the exercise of due diligence, to exist; and for a further

9. Permitting defendant to submit additional motions as the need arises based upon the receipt of additional information pursuant to this application; and for a further

10. Pursuant to Section 240.20 of the Criminal Procedure Law requiring the People to permit discovery and inspection of the following:

a. All reports and documents or copies thereof concerning the physical or mental examinations, or scientific tests or experiments made in connection with this case, including all expert and accident reconstruction reports that are in the possession, custody and/or control of the District Attorney, the existence of which is known or which should, through the exercise of due diligence, become known to the District Attorney;

b. Statements of all witnesses concerning the crimes charged herein made to a public servant or to any person acting under his direction or in cooperation with him, exculpatory or otherwise, which is within the possession, custody and/or control of the District Attorney, the existence of which is known or which should become known through the exercise of due diligence by said District Attorney;

c. The names and addresses of all witnesses to the crimes charged herein whether or not the People intend to call said person as a witness or otherwise;

d. The arrest and conviction records of persons the District Attorney intends to call as witnesses during the trial of the charges herein;

e. A true and complete copy of any photographs taken of the defendant, including so-called "mug shots";

f. The names and addresses of all persons who have offered or given statements which are exculpatory in nature whether or not the District Attorney plans to call these persons herein as witnesses during the trial of this case;

g. Any evidence including records, statements and/or leads to evidence which are exculpatory in nature and in the possession of the District Attorney and which may be useful for the defense of the charges which are known to him to exist or which should, through the exercise of due diligence, become known to the District Attorney pursuant to *Brady v. Maryland*, 373 U.S. 83;

h. A pre-trial inventory and inspection of all items to be offered as evidence against this defendant under the supervision of the District Attorney's Office;

i. A statement as to any information which may adversely reflect upon the People's witnesses, either as to but not limited to, information pursuant to *Giglio v. U.S.*, 405 U.S. 150, any criminal records of any and all witnesses, if any, and the personal use of drugs, any records and/or evidence of psychiatric treatment or of confinement to any narcotic addiction institution;

j. Copies of any and all police reports in the possession of the prosecution and/or prepared by the arresting agency in this matter;

k. Any and all photographs or diagrams, and if so, permit the defense to examine same;

l. The precise content of each and every oral statement made by the defendant to law enforcement officers;

m. Any document, report or writing prepared relating to or incorporated by officers or reflected upon or summarizing any of defendant's statements;

n. Any and all evidence or materials pursuant to *Brady v. Maryland* which does or may damage or affect the credibility of any police officer or person or witness who may testify in support of the Indictment or in rebuttal to any testimony offered by the defendant or witnesses;

o. Copies of any and all arrest warrants;

p. All written statements;

q. All physical condition reports;

r. Precise and total content of any oral statements and/or any failed sobriety tests;

s. Any notes or memoranda made in connection with any statement or field sobriety tests;

t. Any and all tape recordings made of the defendant's voice or with regard to any aspect of this investigation;

u. All names of the police officers who were involved in the arrest of the defendant;

v. A statement indicating the authority by which the police placed the defendant under arrest;

w. All scientific and accident reconstruction tests and reports conducted re this matter, including but not limited to all notes and records of the arresting officer regarding defendant's alleged intoxicated condition, alcohol influence reports, field sobriety tests, alcohol condition reports, all reports relating to the taking of any chemical test to determine the presence of alcohol, as well as all others;

x. The exact content and substance of any request made to the defendant to submit to any chemical or other test to determine intoxication or any refusal thereof;

y. Any photographs or drawings relating to the criminal action;

z. Anything required to be disclosed prior to trial to the defendant by the prosecutor, pursuant to the Constitution of the State of New York;

aa. All personal records and files regarding the employment of each and every police office who arrested or guarded defendant and who will testify at the time of trial; and

bb. A full and complete description of all "property";

11. For such other and further relief as the Court may deem just and proper.

Dated: Poughkeepsie, New York
March 31, 1988

CRANE WOLFSON ROBERTS
& GRELLER
Attorneys for Defendant
11 Market Street
Poughkeepsie, New York 12601
(914) 454-2200

TO: DUTCHESS COUNTY DISTRICT ATTORNEY

Petitioner's CPLR Article 78 Petition (in the Nature of Prohibition).

APPELLATE DIVISION OF THE SUPREME COURT

SECOND DEPARTMENT: COUNTY OF KINGS

IN THE MATTER OF AN APPLICATION

OF

THOMAS J. CORBIN,

Petitioner,

For a Judgment pursuant to Article 78 of the CPLR,

JUDITH A. HILLERY, as Judge of the County Court, Dutchess County, and WILLIAM V. GRADY, as District Attorney of Dutchess County,

Respondents.

Index No.:

Petitioner, THOMAS J. CORBIN, residing at 36 Vanderwater Drive, Wappingers Falls, New York 12590, for his Petition, respectfully alleges as follows:

1. I am a resident of Dutchess County, New York, and the Petitioner in the above-captioned matter which requests certain relief pursuant to Article 78 of the Civil Practice

Law and Rules. The allegations contained in this Petition are based upon my own personal knowledge except where stated to be made upon information and belief in which case the sources of said information, and the grounds for such belief being an examination of my case file maintained in my attorneys' office, and the materials previously supplied to me and/or my attorneys by the District Attorney of Dutchess County.

2. I am the Defendant in the matter of People of the State of New York against Thomas J. Corbin, now pending in the County Court of Dutchess County, Indictment No.: 6/88.

3. Upon information and belief, the Respondent, Hon. Judith A. Hillery, is a Judge of the County Court of the County of Dutchess, and has been acting in such capacity at all relevant times alleged herein.

4. Upon information and belief, the Respondent, William V. Grady, is the District Attorney of Dutchess County, and had been acting in such capacity at all relevant times alleged herein.

5. This is a Petition pursuant to Article 78 of the CPLR which seeks a Judgment and Order in the nature of a Writ of Prohibition in that my above-mentioned prosecution in the County Court of Dutchess County on Indictment No.: 6/88 is a subsequent prosecution within the meaning of Article 40 of the Criminal Procedure Law and as such, is barred by reason of a former prosecution and that former jeopardy has attached.

6. On October 3, 1987, I was involved in an automobile accident on State Route 55 in the Town of LaGrange, Dutchess County, State of New York.

7. Upon information and belief, Brenda Dirago, who was also involved in the same automobile accident, expired as a result of injuries she sustained in the above-mentioned automobile accident.

8. On October 3, 1987, I was informed that I was under arrest by members of the Dutchess County Sheriff's Department, and served with 2 Uniform Traffic Tickets charging me with Driving While Intoxicated, in alleged violation of section 1192 of the New York State Vehicle and Traffic Law, and Failure to Keep Right, in alleged violation of section 1120(a) of the New York State Vehicle and Traffic Law, respectively.

9. On or about October 15, 1987, I received a set of papers from the Dutchess County District Attorney which included the following: a) DWI Foundation Report

b) 710.30 Notice

c) Supporting Deposition

d) Statement of Readiness for Trial.

10. On October 27, 1987, the date scheduled for my arraignment in the Town of LaGrange Justice Court, Dutchess County, I pled guilty to all the above-mentioned charges. The Court accepted my pleas of guilty, and adjourned the matter for sentencing to November 17, 1987.

11. On November 17, 1987, in the Town of LaGrange Justice Court, I was sentenced to a $350.00 fine, and a six-month revocation of my driving privileges. I received the above sentence pursuant to an affirmative recommendation by Assistant Dutchess County District Attorney, Heidi Sau-

ter, who was physically present in Court on the evening of my sentence.

12. The Court also allowed me a 20-day extension of my driving privileges to apply to attend the safe driver school which might provide me with a conditional driver's license if I qualify.

13. I paid the imposed fine, and my driving privileges are presently revoked.

14. At the time I pled guilty, the above-mentioned charges were the only ones filed against me as a result of the fatal automobile accident which occurred on Route 55 in the Town of LaGrange, County of Dutchess, on October 3, 1987.

15. I was subsequently indicted on or about January 19, 1988 and charged with MANSLAUGHTER IN THE SECOND DEGREE; VEHICULAR MANSLAUGHTER IN THE SECOND DEGREE, (2 counts); CRIMINALLY NEGLIGENT HOMICIDE; ASSAULT IN THE THIRD DEGREE; OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, (pursuant to section 1192(2) of the VTL); and OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, (pursuant to section 1192(3) of the VTL), all arising out of the same incident on October 3, 1987.

16. My attorneys, CRANE, WOLFSON, ROBERTS & GRELLER, ESQS., submitted an Omnibus Motion on my behalf requesting, *inter alia*, relief pursuant to Article 40 of the Criminal Procedure Law.

17. A hearing was held on August 12, and 15, 1988 before the Respondent, Hon. Judith A. Hillery in the County Court of Dutchess County, after which, the relief requested in that portion of the Omnibus Motion was denied, by

decision dated August 18, 1988, and she has set August 25 1988 as the date for the trial of the instant Indictment.

18. The Petitioner has no adequate remedy at law, and has made no prior application to any Court for the relief requested, except as stated herein.

19. I respectfully submit that the Double Jeopardy provisions of Article 40 of the Criminal Procedure Law, as well as the Constitution of the United States, and the State of New York bar my prosecution in the County of Dutchess under Indictment No.: 6/88.

WHEREFORE, I respectfully request that this Court issue a final Order as follows:

a) Granting a Writ of Prohibition barring any subsequent prosecution arising out of an automobile accident which occurred on October 3, 1987, on State Route 55, in the Town of LaGrange, County of Dutchess, State of New York, which was the subject of my previous prosecution, conviction, and sentence, and;

b) Staying and enjoining all further proceedings on Indictment No.: 6/88 against me until the hearing of the within Application, and the entry of a final Order thereon, and;

c) For such other and further relief which as to this Court may seem just and proper.

Dated: Poughkeepsie, New York
August 19, 1988

THOMAS J. CORBIN

Sworn to before me this
19 day of August, 1988.
DENISE K. TOMBOLILLO
Notary Public, State of New York
No. 4792932
Qualified in Oswego County
My Commission Expires 1/31/90

Order Granting Petition for a Writ of Certiorari, Supreme Court of the United States, Dated November 6, 1989.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543
November 6, 1989

Mr. William B. Grady
Courthouse
10 Market St.
Poughkeepsie, NY 12601

Re: William V. Grady, District Attorney of Dutchess County,
v. Thomas J. Corbin
No. 89-474

Dear Mr. Grady:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

No. 89-474 (6)

IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM V. GRADY, DISTRICT ATTORNEY OF DUTCHESS COUNTY,

Petitioner,

vs.

THOMAS J. CORBIN,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR PETITIONER

WILLIAM V. GRADY
District Attorney of Dutchess County
Petitioner, Pro Se (Counsel of Record)
Courthouse
10 Market Street
Poughkeepsie, NY 12601
(914) 431-1940

BRIDGET RAHILLY STELLER
Assistant District Attorney
Of Counsel

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1989
(3616)

38 P

Question Presented

Whether, within the constraints of the double jeopardy clause of the Fifth Amendment, a motorist who causes the death of another person as the result of an automobile collision can be subject to prosecution for homicide, notwithstanding the fact that at the scene of the collision, and prior to the other operator's death, respondent received uniform traffic tickets for Driving While Intoxicated and Failure to Keep to the Right and subsequently entered guilty pleas to those accusatory instruments and was sentenced.

Parties

In the New York State Court of Appeals and the Appellate Division, Second Judicial Department the parties were Thomas J. Corbin and Judith A. Hillery, as Judge of the County Court, Dutchess County and William V. Grady, as District Attorney of Dutchess County. Judith A. Hillery, Judge of the County Court, who was represented by the New York State Attorney General, elected not to appear in either proceeding. In the County Court of Dutchess County the only parties were the People of the State of New York, represented by William V. Grady, District Attorney of Dutchess County and Thomas J. Corbin.

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No. 89-474

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989.

WILLIAM V. GRADY, District Attorney of Dutchess County,

Petitioner,

against

THOMAS J. CORBIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR PETITIONER

The District Attorney of Dutchess County, on behalf of the People of the State of New York, seeks reversal of a judgment of the New York State Court of Appeals. By that judgment, the Court of Appeals, by a divided Court (4-2) reversed a judgment of the New York State Supreme Court, Appellate Division, Second Judicial Department, which dismissed an application to prohibit prosecution on an indictment.

Opinions Below

The opinion of the New York State Court of Appeals which was entered on July 13, 1989, is reported at 74 N.Y. 2d 279, 543 N.E.2d 714, 545 N.Y.S.2d 71 and appears at page 1a *et seq.* of the Petition for Certiorari. The Order of the Appellate Division, Second Judicial Department, dismissing an application to prohibit prosecution is unreported and is set forth at page 1b *et seq.* of the Petition for Certiorari. The opinion of the County Court denying respondent's motion to dismiss the indictment is also unreported and appears at page 1c *et seq.* of the Petition for Certiorari.

Jurisdiction

The judgment of the New York Court of Appeals was entered on July 13, 1989. The Petition for a Writ of Certiorari was filed on September 11, 1989, and this Court granted the Petition on November 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

Constitutional and Statutory Provisions Involved

Statutory provisions involved are set forth in the Appendix to this brief.

Statement Of The Case

At approximately 6:35 p.m. on October 3, 1987, while respondent was operating a motor vehicle in a westbound lane on a state highway, he drove his vehicle into the eastbound lane of traffic and struck the rear view mirror of a vehicle. He then continued into the eastbound lane striking a second vehicle operated by Brenda Dirago and occupied by Daniel Dirago. At the time of the impact there was a moderate to heavy rainfall; the respondent was travelling

at forty-five (45) miles per hour and respondent's vehicle was nine (9) feet into the eastbound lane and there was an overlap of approximately two (2) feet between the left front of the Dirago vehicle and the left front of respondent's vehicle. J.A. 19.[1]

That evening the respondent was issued two uniform traffic tickets accusing him of one misdemeanor, Driving While Intoxicated (New York State Vehicle and Traffic Law Section 1192(3), and one traffic infraction, Failure to Keep Right (New York State Vehicle and Traffic Law Section 1120(a). J.A. 3-4.

After the respondent's arrest, an Assistant District Attorney was called to the scene by the police to prepare a search warrant for the seizure of a sample of respondent's blood, if necessary. No search warrant was prepared because the respondent consented to taking a blood test to determine the level of alcohol in his blood. Pet. 4c. The Assistant District Attorney then left the scene. Later that evening Mrs. Dirago died as a result of injuries sustained in the automobile collision. J.A. 19.

The uniform traffic tickets issued on the night of October 3, 1987, were returnable in the local criminal court on October 29, 1987. J.A. 3-4. However, that Court later advanced the return date to October 27, 1987. In doing so, the Court notified the respondent, but not the prosecutor. App. A11.

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[1] J.A. refers to the Joint Appendix. Pet. refers to the Petition for a Writ of Certiorari. App. refers to the Appellant's Appendix which was filed in the New York State Court of Appeals. T. refers to the transcript of the County Court Double Jeopardy Hearing which is included in the Appellant's Appendix filed with the New York State Court of Appeals.

On October 14, 1918, an Assistant District Attorney who had received the District Attorney's file on the misdemeanor and traffic infraction charges, but who had no knowledge of Mrs. Dirago's death, mailed to the defendant copies of a statement of readiness for trial, (N.Y.C.P.L. Section 30.30) a notice of intent to use defendant's statements made to a public servant, (N.Y.C.P.L. Section 710.30) a supporting deposition for the Driving While Intoxicated charge (N.Y.C.P.L. Section 100.25) and a DWI foundation report. J.A. 5-10. Those documents, however, were never filed with the local criminal court. T. 114-16, 143.

On October 27th the respondent and counsel appeared before the local criminal court and respondent entered pleas of guilty to the two offenses charged in the uniform tickets. J.A. 11. At the beginning of the plea inquiry the Court asked the following question and received the following response:

> Judge: Have you contacted ADA's office?
>
> Attorney: Yes. We have received papers. We have also discussed this matter with Mr. Corbin.

(J.A. 11) At the time the court accepted the pleas the Judge was not aware that the case involved an automobile accident or a death. T. 111. Since no prosecutor was present at the time the guilty pleas were entered, and no prosecutor had been scheduled to appear that night, the Court adjourned the matter for sentencing until November 17, 1987. On November 17th the respondent was sentenced to the usual sentence imposed on a first-time Driving While Intoxicated offender, *i.e.*, a Three Hundred Fifty Dollar ($350.00) fine, and a conditional discharge to attend the New York State Vehicle and Traffic Law Article 21 School; the respondent's license was suspended and he was given a

twenty (20) day conditional license. J.A. 32. At the time of sentencing neither the Assistant District Attorney who was present nor the Court knew that the case involved a fatal automobile collision. T. 114, 121-22, 153.

In the meantime, on October 30, 1987, the District Attorney had received the results of respondent's October 3rd blood test which indicated that respondent had a blood alcohol level of .19 percent. T. 54-55; J.A. 20. Also, the prosecutor assigned to investigate the fatality sent a letter to defendant's attorney dated November 12, 1988, indicating that the vehicles involved in the collision had been inspected "in preparation for the Grand Jury proceeding" and were available for inspection by the defense. App. A16.

In early January 1988 the District Attorney received the report of an accident reconstructionist, which had been commissioned in early October 1987. T. 83-84. A Grand Jury was then impanelled and an Indictment dated January 19, 1988, was returned accusing respondent Corbin of one count of Manslaughter in the Second Degree (in violation of New York State Penal Law Section 125.15); two counts of Vehicular Manslaughter in the Second Degree (in violation of New York State Penal Law Section 125.12, Subdivisions 1 and 2); one count of Criminally Negligent Homicide (in violation of New York State Penal Law Section 125.10); one count of Assault in the Third Degree (in violation of New York State Penal Law Section 120.00, Subdivision 2); one count of Operating a Motor Vehicle While Under the Influence of Alcohol (in violation of New York State Vehicle and Traffic Law Section 1192, Subdivision 2) and one count of Operating a Motor Vehicle While Under the Influence of Alcohol (in violation of New York State Vehicle and Traffic Law Section 1192, Subdivision 3). J.A. 13-17.

In County Court the respondent sought dismissal of the Indictment in part on the ground that prosecution under the

Indictment was barred by his prior pleas of guilty to Driving While Intoxicated and Failure to Keep Right. After a hearing, the County Court denied the motion. Pet. 1c *et seq.* The Court relied on N.Y.C.P.L. 40.30(2)(b), which provided for an exception to the general statutory protection against successive prosecutions where the previous prosecution "was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendants without the knowledge of the appropriate prosecutor, for the purpose of avoid prosecution for a greater offense." The Court found that respondent's counsel had misrepresented the facts at the October 27th plea allocution and that these misrepresentations obviated respondent's statutory protection against double jeopardy. Pet. 8c-9c. In addition, the Court relied on Section 1800 (d) of the New York Vehicle and Traffic Law, which provides explicitly that:

> a conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle or a motor cycle.

Pet. 9c.

The respondent then commenced a proceeding pursuant to New York State Civil Practice Law and Rules Article 78 in the nature of prohibition seeking to prevent the County Court and the District Attorney from proceeding with his prosecution on the ground that such prosecution was barred by the double jeopardy clause of the United States Constitution. The Appellate Division dismissed the proceeding without opinion. Pet. 1b *et seq.*

The respondent then appealed to the New York State Court of Appeals. That Court reversed the order of the Appellate Division. The majority of the Judges, relying on

this Court's dicta in *Illinois v. Vitale*, 447 U.S. 410 (1980), concluded that the double jeopardy principles of the Federal Constitution precluded prosecution under this Indictment. Pet. 1a-14a.

In reaching its conclusion, the Court resolved a number of state law issues. The Court held that N.Y.C.P.L. Section 40.30(2)(b) was inapplicable because the traffic-ticket guilty pleas were not "procured without the knowledge of the prosecution." Pet. 6a-9a. In addition, the Court found that the two misdemeanor counts included in the seven count indictment were barred by the general New York statutory double jeopardy provision, which prohibits successive prosecutions arising out of the "same transaction."[2] Pet. 13a.

Prosecution of the remaining five counts appeared to be permitted by state law, since Section 1800(d) provided express authority to prosecute "homicide" or "assault" charges even after a conviction for a traffic offense. Pet. 10a. Therefore, the Court had to determine whether Section 1800(d) was constitutional as applied to this case.

To decide whether the Double Jeopardy Clause would thus bar this prosecution, the Court turned to the familiar rule of *Blockburger v. United States*, 284 U.S. 299, 304 (1932), that two offenses are not "the same" if "each provision requires proof of fact which the other does not." Quoting *Illinois v. Vitale*, 447 U.S. 410, 416 (1980), the Court recognized that the *Blockburger* test "focuses on the

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[2]These two counts charged respondent with driving while intoxicated in violation of N.Y. Vehicle & Traffic Law Section 1192(3)—the precise provision to which he had already pled guilty—and a companion provision prohibiting driving a car with a blood alcohol count of .10% or greater, *id.* Section 1192(2). The Court held that Section 1192(2) and Section 1192(3) were "linguistically different," see Pet. 13a n.7, but "indistinguishable." Pet. 13a.

proof necessary to prove the statutory elements of each offense rather than on the actual evidence to be presented at trial." Pet. 11a.

The Court apparently believed that, under this "traditional" *Blockburger* test, Pet. 12a n.7, three of the five remaining offenses—reckless manslaughter, criminally negligent homicide, and third-degree reckless assault—would not be held to be the "same offense" as those to which respondent had pleaded guilty. Each of these offenses requires an element—death or injury to a person—that is not required under either of the traffic misdemeanors to which respondent had pleaded guilty. In turn, the traffic-ticket misdemeanors to which respondent had pleaded guilty required an element—operation of a motor vehicle—that is not required for conviction of any of these three offenses.[3]

[3]Two of the five homicide or assault offenses—those charging second degree vehicular homicide—were held to be barred even under the "traditional" *Blockburger* test. Pet. 12a n.7. Although the discussion is not altogether clear, the Court appears to have reached this result on the basis of a conclusion that driving while intoxicated, in violation of Section 1192(3), to which respondent pled guilty, and Section 1192(2), with which he was not charged, were "the same offense" as each other and both were "lesser included offenses" of second-degree vehicular homicide. In the Court's terms, a second-degree vehicular homicide was "in essence, the crime of criminally negligent homicide * * * with driving while intoxicated in violation of Vehicle and Traffic Law Section 1192(2) or (3) as an aggravating factor." *Id.* In addition, the "proof necessary to establish the 'driving while intoxicated' elements" of a Section 1192(2) vehicular homicide and a Section 1192(3) vehicular homicide is "the same." Therefore, counts two and three of the indictment—which charged vehicular homicide with Section 1192(2) and Section 1192(3) as aggravating factors, respectively—were the same as each other under a "traditional" *Blockburger* test. Finally, because the traffic-ticket offense to which respondent had pleaded guilty—Section 1192(3) itself—was a lesser included offense of both counts two and three under that same test, counts two and three were both barred in accordance with this "traditional" *Blockburger* analysis.

Relying on what it termed a "pointed dictum" from *Illinois v. Vitale*, 447 U.S. 410, 421 (1980), *see* Pet. 11a, the Court nonetheless found that the prosecution on the homicide and assault charges was barred by the Double Jeopardy Clause. The majority held that *Vitale* required, in addition to the customary *Blockburger* test focusing on the statutory elements of the two crimes, a further inquiry into the actual proof to be presented at trial. In this case, the prosecution had "affirmatively stated in its bill of particulars that it intends to use the acts underlying [the traffic offenses to which respondent had pleaded guilty] as the major part of its proof on the reckless and negligence elements of the former crimes." Pet. 12a. Therefore, because, according to the Court, "the prosecution will rely on the prior traffic offenses as the acts necessary to prove the homicide and assault charges," prosecution of the latter charges is "constitutionally prohibited." Pet. 12a.

Speaking for the two dissenting Judges, Chief Judge Wachtler stated:

> It devalues the double-jeopardy clause of the Fifth Amendment of the Federal Constitution when a defendant, unquestionably intoxicated at the time his auto struck and killed a person, avoids a homicide prosecution by actively misleading a justice of the peace into believing that no accident occurred, and no one was killed.

Pet. 14a.

The dissenters did not reach the constitutional double jeopardy issue, finding that the respondent had procured his prosecution for the traffic offenses by misleading the local criminal court judge. Since the respondent had engaged in a "fraudulent scheme" to avoid prosecution for the greater

offense, prosecution for the homicide was permitted pursuant to N.Y.C.P.L. 40.30(2)(b). Pet. App. 14a-15a.

Summary of Argument

In *Blockburger v. United States*, 284 U.S. 299, 304 (1932) this Court held that:

> . . . [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

This "same offense" *Blockburger* statutory analysis should not now be abandoned or expanded.

Under New York Law Manslaughter in the Second Degree and Criminally Negligent Homicide necessarily involve death as an element of the crime. Similarly, Assault in the Third Degree involves physical injury as an element of the crime. Neither of these homicide charges nor the assault charge requires proof of a particular instrumentality of the crime or that the defendant was intoxicated. On the other hand, Driving While Intoxicated and Failure to Keep Right can only be committed by the operator of a motor vehicle and do not necessarily involve death or physical injury. Thus there is a lack of mutuality in the elements of the various crimes and they are not the "same offense" for purposes of constitutional double jeopardy analysis.

Consequently, the petitioner submits that the New York State Court of Appeals erred in prohibiting prosecution on the indictment and the case should be reversed and remanded.

Argument

The New York State Court of Appeals Erred In Its Interpretation of This Court's Rulings and Respondent's Prosecution for Manslaughter, Criminally Negligent Homicide and Assault Should Continue.

The majority of the New York Court of Appeals, relying on this Court's statements in *Illinois v. Vitale*, 447 U.S. 410, 421 (1980) clearly ruled that prosecution for Manslaughter in the Second Degree, Criminally Negligent Homicide and Assault in the Third Degree under the first, fourth and fifth counts of the indictment were prohibited by the Fifth Amendment double jeopardy provisions (Pet. 11a-12a) which are made applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 796 (1969). The petitioner contends that this expansive interpretation of double jeopardy protections is inconsistent with this Court's prior rulings. *See Iannelli v. United States*, 420 U.S. 770, 785 N.17 (1975); *Gavieres v. United States*, 220 U.S. 338, 343-44 (1911).

Twenty years ago this Court specifically recognized that the Fifth Amendment double jeopardy guarantee involved three separate protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnote omitted). *Accord Garrett v. United States*, 471 U.S. 773, 777 (1985); *Illinois v. Vitale*, 447 U.S. 410, 415 (1980).

The issue in the instant case is whether the homicide and assault counts, which could be prosecuted pursuant to New York State Vehicle and Traffic Law Section 1800(d) are the "same offense" as Driving While Intoxicated and Failure to Keep Right, the vehicle and traffic offenses to which respondent entered guilty pleas. The respondent submits that they are different offenses.

In *Blockburger v. United States, supra,* 284 U.S. at 304 this Court stated:

> . . . [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. *Gavieres v. United States,* 220 U.S. 338, 342 (1911) and authorities cited. In that case this Court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth,* 108 Mass. 433 (1871); "a single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

This is a technical test focusing on the statutory elements; it is not concerned with an overlap, even a substantial overlap, in the proof on which the prosecution relies to establish the elements of the offenses. *Iannelli v. United States, supra,* 420 U.S. at 785 N.17.

Here, on October 27, 1987, respondent entered pleas of guilty to the misdemeanor of Driving While Intoxicated (New York State Vehicle and Traffic Law Section 1192, Subdivision 3) and the traffic infraction of Failure to Keep

Right. New York State Vehicle and Traffic Law Section 1120, Subdivision a. In order to establish respondent's guilt of Driving While Intoxicated in violation of Section 1192, Subdivision 3, the prosecution would have to establish that the respondent operated a motor vehicle, (*i.e.,* a vehicle operated on a public highway which is propelled by power other than muscular power (New York State Vehicle and Traffic Law Section 125)), while in an intoxicated condition. The New York State Court of Appeals has ruled that a driver is intoxicated when

> he has voluntarily consumed alcohol to the extent that he is incapable of employing the physical and mental abilities which he is expected to possess in order to operate a vehicle as a reasonable and prudent driver.

People v. Cruz, 48 N.Y.2d 419, 428, 399 N.E.2d 513, 423 N.Y.S.2d 625, 629 (1979), appeal dismissed 446 U.S. 901 (1980). In order to establish a defendant's guilt of Failure to Keep Right, the prosecution would have to establish that the defendant was operating a motor vehicle on a road of sufficient width and failed to keep his vehicle on the right half of the roadway. Therefore, both offenses to which appellant entered pleas of guilty required the prosecution to establish as an element of the offense that the appellant was operating a motor vehicle.

On the other hand, neither the homicide nor the assault counts in the indictment require the prosecution to establish operation of a motor vehicle as an element of the crime.

Specifically, in order to establish Manslaughter in the Second Degree in violation of New York Penal Law Section 125.15, the prosecution would have to establish that the respondent recklessly caused the death of another, *i.e.,* that the defendant was aware of and consciously disregarded a

substantial and unjustifiable risk that a death would occur (New York Penal Law Section 15.05, Subdivision 3) and that another person died as a result of the respondent's conduct. Under the *Blockburger* test Manslaughter in the Second Degree, as charged in the first count of the indictment, is not the same offense as Driving While Intoxicated or Failure to Keep Right. The Driving While Intoxicated and Failure to Keep Right statutes require proof that the defendant was operating a motor vehicle; that is not a statutory element of the crime of Manslaughter in the Second Degree. On the other hand, Manslaughter in the Second Degree requires proof of a death; Driving While Intoxicated and Failure to Keep Right do not. Therefore, under traditional double jeopardy analysis, the prosecution for Manslaughter in the Second Degree should be permitted.

Under the fourth count of the indictment the respondent is charged with Criminally Negligent Homicide. In order to establish his guilt of that offense, the prosecution must establish that respondent, with criminal negligence, caused the death of another person. New York Penal Law Section 125.10. This would require that the prosecution prove that the respondent failed to perceive a substantial and unjustifiable risk that a death would result (New York Penal Law Section 15.05, Subdivision 4) and that he caused the death. Here too, under the *Blockburger* test, Criminally Negligent Homicide, as charged in the fourth count of the indictment is not the same offense as Driving while Intoxicated and Failure to Keep Right. The Driving While Intoxicated and Failure to Keep Right statutes require proof that the respondent operated a motor vehicle and was intoxicated. These are not statutory elements of Criminally Negligent Homicide. On the other hand, Criminally Negligent Homicide requires proof of a death which Driving While Intoxicated and Failure to Keep Right do not. Therefore, under the traditional double jeopardy analysis, prosecution for

Criminally Negligent Homicide under the fourth count of the indictment should be permitted.

Under the fifth count of the indictment the respondent was accused of Assault in the Third Degree in violation of New York Penal Law Section 120.00, Subdivision 2. In order to establish respondent's guilt of that crime the prosecution was required to prove that the respondent recklessly caused physical injury to another person, *i.e.*, that the respondent was aware of and consciously disregarded a substantial risk that another person would sustain physical injury (New York Penal Law Section 15.05, Subdivision 3) and that other person suffered an "impairment of physical condition or substantial pain" (New York Penal Law Section 10.00, Subdivision 9) as a result of the defendant's acts. Under the *Blockburger* test Assault in the Third Degree, as charged in the fifth count of the indictment is not the same offense as Driving While Intoxicated or Failure to Keep Right. The Driving While Intoxicated and Failure to Keep Right statutes require proof that the defendant was operating a motor vehicle; that is not a statutory element of the crime of Assault in the Third Degree. On the other hand, Assault in the Third Degree requires proof that a person sustained physical injury; Driving While Intoxicated and Failure to Keep Right do not. Therefore, under traditional double jeopardy analysis, the prosecution for Assault in the Third Degree under the fifth count of the indictment should be permitted.

This Court's ruling in *Vitale* does not require a different conclusion. In *Vitale* the juvenile respondent had struck two small children while operating a motor vehicle. One child died shortly after the collision and the other died the following day. At the scene of the accident, on November 24, 1974, the respondent was issued a traffic citation charging him with failure to reduce speed to avoid an accident. On December 23, 1974, he entered a plea of not guilty to that

charge, was tried, convicted and sentenced to pay a fine of Fifteen Dollars ($15.00). On December 24, 1974, an instrument was filed accusing respondent of two counts of Involuntary Manslaughter. Specifically, he was accused of recklessly driving a motor vehicle and causing the death of two children. *Illinois v. Vitale, supra,* 447 U.S. at 411-12. In evaluating the respondent's contention that his manslaughter prosecution was barred by double jeopardy principles, this Court held:

> . . . [I]f manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the *Blockburger* test. The mere possibility that the state will rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the later prosecution.

Id. at 419. That holding should be controlling here.

In *Vitale* this Court also stated:

> By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.

Id. at 421. That statement did not transform this Court's double jeopardy test to an actual evidence test. *Thigpen v. Roberts,* 468 U.S. 27, 39 (1984) (Rehnquist, J., dissenting). *See United States v. Rosenberg,* ____ F.2d ____ (D.C. Cir. Nos. 89-3070, 89-3071 and 89-3072, 11/3/89)

Although the facts in *Vitale* are not outlined in this Court's decision, the facts as presented by counsel do appear in portions of the briefs filed in this Court. The brief filed by the State of Illinois indicated that the State intended to offer evidence at the manslaughter trial other than a mere failure to slow. *Illinois v. Vitale,* Brief for petitioner at pages 4-5; Reply brief for petitioner at page 2. When considered in this light, this Court's use of the term "the" immediately preceding "reckless act" implies that the Court might have been concerned that the underlying act of the prior conviction was *always* an element needed to prove the involuntary manslaughter. Thus, by remanding the matter to the Illinois Supreme Court for further proceedings, the *Vitale* court adhered to the traditional *Blockburger* test.

Moreover, in considering the language used by this Court in *Vitale,* it should be noted that immediately before making the above quoted statement, this Court discussed its rulings in *Brown v. Ohio,* 432 U.S. 161 (1977); *Harris v. Oklahoma,* 433 U.S. 682 (1977) and *In Re Nielsen,* 131 U.S. 176 (1889). None of these holdings is applicable here. In *Brown,* where the petitioner had stolen a car and had been apprehended driving it nine days later, the petitioner had been charged originally with "joy riding." The petitioner pled guilty to that charge and was sentenced. Subsequently he was indicted for the theft of the car. *Brown v. Ohio, supra,* 432 U.S. at 162-63. This Court found that under the *Blockburger* test joy riding and auto theft as defined by the Ohio Court of Appeals were the "same statutory offense" within the meaning of the Double Jeopardy Clause because the lesser offense, joy riding, required no proof beyond that required to convict for the greater offense. *Id.* at 168. Similarly, in *Harris v. Oklahoma,* this Court found that a conviction for the greater crime of felony murder barred a conviction for the lesser crime of robbery with firearms after a conviction for the murder. *Harris v. Oklahoma, supra,* 433 U.S. at 682.

The Court reached this conclusion because:

> [F]or the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense and the robbery as a species of lesser included offense.

Illinois v. Vitale, supra, 447 U.S. at 420. Finally, in *In Re Nielsen* this Court was concerned with prosecutions for unlawful cohabitation and adultery. This Court determined that the elements of unlawful cohabitation were necessary to establish the adultery. *In Re Nielsen, supra,* 131 U.S. at 187. Thus this Court's *Nielsen* ruling which referred to *Morey v. Commonwealth,* 108 Mass. 433, 435 (1871) (the same decision to which the *Blockburger* court referred) appears to stand for the proposition that a lesser-included offense is the "same offense" as the greater. Therefore, *Nielsen* applied the same traditional double jeopardy principles as *Brown v. Ohio, supra,* 432 U.S. 161; *Nielsen* did not establish a "same evidence" test. *United States v. Rosenberg, supra,* ____ F.2d ____ (D.C. Cir. Nos. 89-3070, 89-3071 and 89-3072 11/3/89). In sum, in light of these three cases, this Court's use of the phrase "substantial claim of double jeopardy" in *Vitale,* should not be equated with the phrase dispositive claim of double jeopardy.

More recently, in *Garrett v. United States, supra,* 471 U.S. at 790, this Court stated that it has "steadfastly" refused to adopt the "single transaction" view of the Double Jeopardy Clause.[4] A "single transaction" view should not be adopted

[4]The issue raised in the instant case deals with a variation of a problem which appears to recur in the state courts. *See e.g., State v. DeLuca,* 108 N.J. 98, 527 A.2d 1355, *cert. denied* 484 U.S. 944 (1987); *State v. Padilla,* 101 N.M. 58, 678 P.2d 686 (1984), *aff'd,* by an equally divided Court *sub nom. Fugate v. New Mexico,* 470 U.S. 904 (1985).

in this case either. Rather, the statutory analysis of *Blockburger* should be applied.[5] Since Manslaughter in the Second Degree, Criminally Negligent Homicide and Assault in the Third Degree contain different statutory elements than Driving While Intoxicated and Failure to Keep Right, the offenses to which the defendant entered guilty pleas, the homicide and assault prosecutions which would be permitted under New York State Vehicle and Traffic Law Section 1800(d) should be permitted to go forward.

Conclusion

The decision of the New York State Court of Appeals in the case at bar is an erroneous application of the Fifth Amendment Double Jeopardy Clause. Manslaughter in the Second Degree, Criminally Negligent Homicide and Assault in the Third Degree are different offenses than Driving While Intoxicated (in violation of New York State

[5]The *Blockburger* test is generally adequate to determine when two offenses are not "the same offense" for purposes of the Double Jeopardy Clause. However, as *Blockburger* itself stated, the test applies only "where the *same act or transaction* constitutes a violation of two distinct statutory provisions." *Blockburger v. United States, supra,* 284 U.S. at 304 (emphasis added). Thus, there are cases involving compound-predicate criminal offenses in which simple application of the *Blockburger* test would find one offense to be a greater or lesser included offense of another, but in which successive prosecutions are not barred because the two offenses do not arise from the "same act or transaction." In *Garrett v. United States, supra,* 471 U.S. at 790, the defendant was prosecuted for importation of marijuana and then prosecuted for engaging in a continuing criminal enterprise in violation of 21 U.S.C. 848. Despite the fact that a simple application of *Blockburger* would have rendered the former offense a "lesser included offense" of the latter, the Court expressed "serious doubts" as to whether "the prosecution of the former would bar a prosecution of the latter". The Court counseled "caution against ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation presented in *Brown [v. Ohio,* 432 U.S. 161 (1977),] to the multi-layered conduct both as to time and place, involved in [*Garrett*]." 471 U.S. at 789.

Vehicle and Traffic Law Section 1192, Subdivision 3) and Failure to Keep Right. It devalues the double jeopardy clause to permit a defendant to plead guilty at arraignment to vehicle and traffic offenses and thereby preclude prosecution for homicide and assault when the latter contain different elements than the offenses admitted by the respondent. Moreover, the New York State Court of Appeals' expansive ruling grants the respondent enhanced protection which is not warranted by this Court's previous rulings.

For all the foregoing reasons we ask this Court to reverse the decision of the New York State court of Appeals and remand this case for further appropriate proceedings.

Respectfully submitted,

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PETITIONER'S APPENDIX.

Constitutional and Statutory Provisions Involved

Constitutional Provisions:

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment of the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutory Provisions:

New York State Vehicle and Traffic Law Section 125 provides:

> **Motor Vehicles.** Every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power, except (a) electrically-driven mobility assistance devices operated or driven by a person with a disability, (b) vehicles which run only upon rails or tracks, (c) snowmobiles as defined in article forty-seven of this chapter, and (d) all terrain vehicles as defined in article forty-eight-B of this chapter. For the purposes of title four, the term motor vehicle shall exclude fire and police vehicles. For the purposes of titles four and five the term motor vehicles shall exclude farm type tractors and all terrain type vehicles used exclusively for agricultural purposes, or for snow plowing, other than for hire, farm equipment, including self-propelled machines used exclusively in growing, harvesting or handling farm produce, and self-propelled caterpillar or crawler-type equipment while being operated on the contract site.

New York State Vehicle and Traffic Law Section 1120(a) provides:

> (a) Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:
>
> 1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

> 2. When overtaking or passing pedestrians, animals or obstructions on the right half of the roadway;
>
> 3. When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right of way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;
>
> 4. Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or
>
> 5. Upon a roadway restricted to one-way traffic.

New York State Vehicle and Traffic Law Section 1192 (which was in effect on October 3, 1987) provided:

> 1. No person shall operate a motor vehicle while his ability to operate such motor vehicle is impaired by the consumption of alcohol. Except as provided in subdivision five-a of this section, a violation of this subdivision shall be a traffic infraction and shall be punishable by a fine of two hundred fifty dollars, or by imprisonment in a penitentiary or county jail for not more than fifteen days, or by both such fine and imprisonment. A person who operates a vehicle in violation of this subdivision after having been convicted of a violation of any subdivision of this section within the preceding five years shall be punished by a fine of not less than three hundred fifty dollars nor more than five hundred dollars, or by imprisonment of not more than thirty days in a penitentiary or county jail or by both such fine and imprisonment. A person who operates a vehicle in

violation of this subdivision after having been convicted two or more times of a violation of any subdivision of this section within the preceding ten years shall be punished by a fine of not less than five hundred dollars nor more than fifteen hundred dollars, or by imprisonment of not more than ninety days in a penitentiary or county jail or by both such fine and imprisonment.

2. No person shall operate a motor vehicle while he has .10 of one per centum or more by weight of alcohol in his blood as shown by chemical analysis of his blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this chapter.

3. No person shall operate a motor vehicle while he is in an intoxicated condition.

4. No person shall operate a motor vehicle while his ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter.

5. Except as provided in subdivision five-a of this section, a violation of subdivision two, three or four of this section shall be a misdemeanor and shall be punishable by imprisonment in a penitentiary or county jail for not more than one year, or by a fine of not less than three hundred fifty dollars nor more than five hundred dollars, or by both such fine and imprisonment. A person who operates a vehicle in violation of subdivision two, three or four of this section after having been convicted of a violation of subdivision two, three or four of this section, or of driving while intoxicated, or of driving while his or her ability is impaired by the use of drugs, within the

preceding ten years, shall be guilty of a felony, and shall be punished by a fine of not less than five hundred dollars and such other penalties as are provided in the penal law.

5-a. (a) A violation of subdivision one, two, three or four of this section wherein the violator is operating an omnibus as defined in section one hundred twenty-six of this chapter, taxicab as defined in section one hundred forty-eight-a of this chapter, or livery as defined in section one hundred twenty-one-e of this chapter, and such omnibus, taxicab or livery is carrying a passenger for compensation, or a school bus as defined in section one hundred forty-two of this chapter, carrying a passenger shall be a misdemeanor punishable by a fine of not less than five hundred dollars nor more than fifteen hundred dollars and such other penalties as are provided in the penal law.

(b) A violation of subdivision one, two, three or four of this section wherein the violator is operating a truck over eighteen thousand pounds, a motor vehicle carrying hazardous materials, as defined in section three hundred eight of this chapter, for commercial purposes, or any motor vehicle registered or registrable under schedule F of subdivision seven of section four hundred one of this chapter shall be a misdemeanor punishable by a fine of not less than five hundred dollars nor more than fifteen hundred dollars and such other penalties as are provided in the penal law.

(c) A person who operates a vehicle in violation of any provision of this section which is punishable as provided in paragraph (a) or (b) of this subdivision after having been convicted of a violation of this

section and penalized under paragraph (a) or (b) of this subdivision within the preceding ten years, shall be guilty of a felony, and shall be punishable by a fine of not less than one thousand dollars nor more than five thousand dollars and such other penalties as are provided in the penal law.

(d) Nothing contained in this subdivision shall prohibit the imposition of a charge of any other felony set forth in this or any other provision of the law for any acts arising out of the same incident.

(e) The sentences required to be imposed by paragraph (a), (b) or (c) of this subdivision shall be imposed notwithstanding any contrary provision of this chapter or the penal law; provided, however, that if the district attorney upon reviewing the available evidence determines that the sentence which would be mandated by paragraph (a), (b) or (c) of this subdivision is not warranted, he may set forth upon the record the basis for such determination and consent to a disposition by plea of guilty to another charge in satisfaction of such charge, and the court may accept such plea.

6. Notwithstanding any provision of the penal law, no judge or magistrate shall impose a sentence of unconditional discharge for a violation of any subdivision of this section nor shall he impose a sentence of conditional discharge or probation unless such conditional discharge or probation is accompanied by a sentence of a fine as provided in this section.

7. A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of

a violation of subdivision one of this section for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to section five hundred ten of this chapter; provided, however, that such conduct, had it occurred in this state, would have constituted a violation of any of the provisions of this section.

8. The provisions of this section shall apply to the places listed in subdivision (a) of section eleven hundred of this chapter, except that for the purposes of this section "parking lot" shall mean any area or areas of private property, including a driveway, near or contiguous to and provided in connection with premises and used as a means of access to and egress from a public highway to such premises and having a capacity for the parking of four or more motor vehicles. The provisions of this section shall not apply to any area or areas of private property comprising all or part of property on which is situated a one or two family residence.

New York State Vehicle and Traffic Law Section 1800(d) provides:

A conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle or motorcycle.

New York State Penal Law Section 10.00 (9) provides:

"Physical injury" means impairment of physical condition or substantial pain.

New York State Penal Law Section 15.05 provides:

The following definitions are applicable to this chapter:

1. "Intentionally." A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

2. "Knowingly." A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.

3. "Recklessly." A person acts recklessly with respect to a result or to a circumstance by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

4. "Criminal negligence." A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it

constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

New York State Penal Law Section 120.00 provides: A person is guilty of assault in the third degree when:

1. With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or

2. He recklessly causes physical injury to another person; or

3. With criminal negligence, he causes physical injury to another person by means of a deadly weapon or a dangerous instrument.

Assault in the third degree is a class A misdemeanor.

New York State Penal Law Section 125.10 provides:

A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

Criminally negligent homicide is a class E felony.

New York State Penal Law Section 125.12 provides:

A person is guilty of vehicular manslaughter in the second degree when he:

(1) commits the crime of criminally negligent homicide as defined in section 125.10, and

(2) causes the death of such other person by operation of a vehicle in violation of subdivision two, three or four of section eleven hundred ninety-two of the vehicle and traffic law.

Vehicular manslaughter in the second degree is a class D felony.

New York State Penal Law Section 125.15 provides:

A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person; or

2. He commits upon a female an abortional act which causes her death, unless such abortional act is justifiable pursuant to subdivision three of Section 125.05; or

3. He intentionally causes or aids another person to commit suicide.

Manslaughter in the second degree is a Class C felony.

New York State Criminal Procedure Law Section 40.30 provides:

1. Except as otherwise provided in this section, a person "is prosecuted" for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either:

(a) Terminates in a conviction upon a plea of guilty; or

(b) Proceeds to the trial state and a jury has been impaneled and sworn, or, in the case of a trial by the court without a jury, a witness is sworn.

2. Despite the occurrence of proceedings specified in subdivision one, a person is not deemed to have been prosecuted for an offense, within the meaning of section 40.20, when:

(a) Such prosecution occurred in a court which lacked jurisdiction over the defendant or the offense; or

(b) Such prosecution was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant, without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense.

3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its prepleading status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument.

4. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which dismisses the accusatory instrument but authorizes the

people to obtain a new accusatory instrument charging the same offense or an offense based upon the same conduct, the nullified proceedings do not bar further prosecution of such offense under any new accusatory instrument obtained pursuant to such court order or authorization.

No. 89-474 (6)

IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM V. GRADY, DISTRICT ATTORNEY OF DUTCHESS COUNTY,

Petitioner,

vs.

THOMAS J. CORBIN,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENT

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(3721)

Questions Presented

Whether the New York State Court of Appeals properly sustained respondent's claim of Double Jeopardy under the Constitution of the United States by holding that respondent's plea of guilty of and sentence for driving while intoxicated and failure to keep right prohibited the subsequent prosecution for manslaughter in the second degree, criminally negligent homicide, and assault in the third degree, charges arising out of the same event.

Whether Section 1800(d) of the New York Vehicle & Traffic Law is unconstitutional.

Statutory Provision Involved

New York Criminal Procedure Law § 170.20 provides:

> § 170.20. Divestiture of jurisdiction by indictment; removal of case to superior court at district attorney's instance.
>
> 1. If at any time before entry of a plea of guilty to or commencement of a trial of a local criminal court accusatory instrument containing a charge of misdemeanor, an indictment charging the defendant with such misdemeanor is filed in a superior court, the local criminal court is thereby divested of jurisdiction of such misdemeanor charge and all proceedings therein with respect thereto are terminated.
>
> 2. At any time before entry of a plea of guilty to or commencement of a trial of an accusatory instrument specified in subdivision one, the district attorney may apply for an adjournment of the proceedings in the local criminal court upon the ground that he intends to present the misdemeanor charge in question to a grand jury with a view to prosecuting it by indictment in a superior court. In such case, the local criminal court must adjourn the proceedings to a date which affords the district attorney reasonable opportunity to pursue such action, and may subsequently grant such further adjournments for that purpose as are reasonable under the circumstances. Following the granting of such adjournment or adjournments, the proceedings must be as follows:
>
> (a) If such charge is presented to a grand jury within the designated period and either an indictment or a dismissal of such charge results, the local

> criminal court is thereby divested of jurisdiction of such charge, and all proceedings in the local criminal court with respect thereto are terminated.
>
> (b) If the misdemeanor charge is not presented to a grand jury within the designated period, the proceedings in the local criminal court must continue.

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STATUTES:

No. 89-474

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989.

WILLIAM V. GRADY, District Attorney of Dutchess County,

Petitioner,

against

THOMAS J. CORBIN,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR RESPONDENT

Statement of the Case

On October 3, 1987, at approximately 6:35 p.m., respondent Thomas J. Corbin was involved in an automobile accident on State Highway 55 in the Town of

LaGrange, Dutchess County, New York. (J.A. 19).[1] Corbin's car came into contact with one automobile and then collided with another carrying Brenda and Daniel Dirago. After receiving a call from the Dutchess County Sheriff's office, Dutchess County Assistant District Attorney Dolan (the bureau chief supervising the other ADAs—Chase, Glick and Sauter--who subsequently shared responsibility for managing this case for the prosecution, T. 205), went to the scene of the accident that night (T. 205), pursuant to the practice of his office in such cases (T. 206). When he arrived, he learned that someone had been severely injured, and that Corbin had been arrested for driving while intoxicated (T. 206, 213). When asked by officers at the scene whether he "thought additional charges were appropriate," Dolan replied that he "didn't think so at that point" (T. 213). Later that same evening, Dolan was informed that Brenda Dirago had died. He took no action in response (T. 207).

Corbin was hospitalized that night for treatment of his injuries. While at the hospital, he was served with two traffic tickets: one for "DWI" (New York Vehicle & Traffic Law § 1192 [3]); one for "failure to keep right" (New York Vehicle & Traffic Law § 1120[a]) (*see* tickets, J.A. 3, 4). The tickets directed him to appear in the LaGrange Town Court on October 29, 1987 (*id.*). Corbin, who had admitted before his arrest that he had been drinking (J.A. 10, 20) consented to the taking of tests to determine the level of alcohol in his blood; those tests were performed at the

[1] "J.A." refers to the Joint Appendix. "Pet." refers to the Petition for a Writ of Certiorari. "App." refers to the Appellant's Appendix filed in the New York State Court of Appeals. "T." refers to the transcript of the County Court hearing included in the Appellant's Appendix filed in the New York State Court of Appeals. The decision of the New York State Court of Appeals, *Corbin v. Hillery*, 74 N.Y.2d 279, 543 N.E.2d 714, 545 N.Y.S.2d 71 (1989) appears at Pet. at 1a *et seq.*

hospital that same evening (J.A. 8, 20). His blood alcohol level was .19% (J.A. 20).

The members of the District Attorney's office began to work on this case almost immediately. In addition to ADA Dolan, the others responsible for this case were ADAs Glick, a DWI special prosecutor (T. 19); Chase, head of the DWI program (T. 51); and Sauter, who later appeared for the prosecution in the LaGrange Town Court. ADA Glick received the file "towards the end of the week beginning October 5th [1987]" (T. 20). On October 14th, he sent a letter to the LaGrange Town Court and to Corbin (App. 11) enclosing a Statement of Readiness for trial, a "710.30 Notice" that statements made by Corbin would be offered on trial, a DWI Investigative Report, Supporting Deposition, and a DWI Foundation Report (J.A. 5-10). As the New York State Court of Appeals later observed, Glick was "inexplicably unaware that the accident had resulted in a fatality" (Pet. at 3a). According to Glick, the file contained no indication that a death had occurred (T. 20), even though the DWI Foundation Report he sent to the Court refers to "Serious P.I." in two places (J.A. 10).

When Glick marked the case ready for trial he knew that a serious personal injury had occurred (T. 29, 30), but made no effort to ascertain the nature or extent of the injury (T. 31). On October 14th or 15th, ADA Chase took the file from Glick (T. 22). The LaGrange Town Court file contained none of the documents referred to in Glick's October 14, 1987 letter (T. 114-115, 143).

Although the traffic tickets served on the night of the accident directed Corbin to appear in the LaGrange Town Court on October 29, 1987 (J.A. 3, 4), the return date was advanced to October 27th pursuant to a letter from the Court (App. 10, T. 145). The involved members of the

District Attorney's office disclaimed knowledge of this communication; however, the Court Clerk sent ADA Sauter copies of the tickets on October 7, 1987 (J.A. 11, T. 185, *see* T. 138).[2]

On October 27, 1987, Corbin and his attorney appeared in the LaGrange Town Court before Justice Caplicki and pleaded guilty to the traffic offenses (J.A. 11). Justice Caplicki accepted Corbin's guilty plea, but postponed sentencing until "DA night"—November 17, 1987 (*id.*). No prosecutor appeared on October 27, 1987 (the date fixed by the Court, App. 10), because that was not a "DA night," *i.e.*, a night upon which a member of the prosecutor's staff was scheduled to attend. The adjourned sentencing date was selected by Justice Caplicki because it was a "DA night" and because the file contained no sentencing recommendation from the prosecution (J.A. 11, *see* T. at 112-113).

"A.D.A. Chase, who was aware that a person had been killed in the accident, began as early as October 6, 1987 to gather evidence. Despite his active involvement in building a homicide case against [Corbin], however, Chase did not attempt to ascertain the date [Corbin] was scheduled to appear . . . on the traffic tickets, nor did he inform either the Town Justice Court or the assistant district attorney covering that court about his pending investigation." (Pet. at 4a; *see* T. 52-55). On November 12, 1989, however, Chase sent a letter advising Corbin's counsel that the cars involved in the collision had been impounded and examined by the prosecution "in preparation for the Grand Jury proceeding", and were available for inspection by defense counsel (App. 16).

[2]On October 4, 1987, the day following the accident, the Poughkeepsie Journal carried an article ("LaGrange crash kills one") describing the collision, the injuries sustained, the death of Brenda Dirago, the charges filed against Corbin, and the return date of the tickets (App. 35).

On November 17, 1987 ADA Sauter appeared at the LaGrange Town Court, examined the Court file, and satisfied herself that Corbin had no prior record (T. 171, 173). Sauter had no information about the facts of the case. "Nevertheless, Sauter did not request an adjournment so that she could ascertain the facts necessary to make an informed sentencing recommendation" (Pet. at 4a). Sauter recommended that the Court impose the "minimum sentence" (J.A. 12). Corbin was sentenced to a fine, license revocation and other sanctions (J.A. 12, 32). The sentence imposed was satisfied (J.A. 33).

Three and one half months after the accident, on January 19, 1988, Corbin was indicted by the grand jury (J.A. 13-17). He was accused of: (1) Manslaughter in the Second Degree ("recklessly caus[ing] the death of another person * * *" [Penal Law § 120.15]); (2) Vehicular Manslaughter in the Second Degree ("with criminal negligence caused the death of another person * * * by operating a vehicle * * * while he had more than .10 of one per centum of alcohol in his blood" (Penal Law § 125.12(1), (2); Vehicle & Traffic Law § 1192(2)]); (3) Vehicular Manslaughter ("by operating a motor vehicle * * * while in an intoxicated condition" [Penal Law § 125.12(1), (2); Vehicle & Traffic Law § 1192(3)]); (4) Criminally Negligent Homicide ("with criminal negligence caused the death of another person" [Penal Law § 125.10]); (5) Assault in the Third Degree ("recklessly caused physical injury to another" [the husband of the deceased] [Penal Law § 120.00 (2)]); (6) Driving While Intoxicated (.10% alcohol [Vehicle & Traffic Law § 1192(2)]; and (7) Driving While Intoxicated [Vehicle & Traffic Law § 1192(3)].

On February 5, 1988, Corbin was arraigned on the indictment and the prosecution served and filed its Bill of Particulars (J.A. 18-21). The Bill of Particulars specifies

the prosecution's version of the *actus reus*: Corbin [1] "operated a motor vehicle on a public highway in an intoxicated condition having more than .10 percent of alcohol content in his blood"; [2] "failed to keep right and in fact crossed nine feet over the median of the highway"; [3] "while driving at approximately forty-five to fifty miles an hour in heavy rain, which was a speed too fast for the weather and road conditions then pending." (J.A. 20).

Corbin's counsel promptly moved to dismiss the indictment on constitutional and statutory Double Jeopardy grounds (J.A. 22). County Court Judge Hillery directed that a hearing be held to inquire into the events surrounding Corbin's guilty plea in the Town Court (App. 36). The hearing was held on August 12th and 15th, 1988. On August 18, 1988, Judge Hillery denied the motion (Pet. at 1c), finding "that the failure of defense counsel, on October 27, 1987 to inform the Court that these pleas arose out of an incident involving a fatality and further that the failure of counsel to inform the Court on November 17, 1987 of Assistant District Attorney Chase's written communication [of November 12, 1987] leads this Court to no other conclusion than that the proceedings involving the taking of the pleas and the subsequent sentencings were carried out in such a manner and under circumstances which make those procedures as a matter of law a nullity (see CPL Section 40.30, Subd. 2(b)." (Pet. at 8c-9c).[3]

Corbin's lawyers then brought a proceeding under New York Civil Practice Law and Rules Article 78 before the

[3]The New York State Court of Appeals held that the requirements of the cited statute were "simply not satisfied" in this case, noting that the prosecution "failed at every possible turn" to impart to the Town Court its knowledge of the events of October 3, 1987. Pet. at 7a, 8a, 8a n.5. Thus, as much of the Petitioner's Statement of the Case as deals with any alleged "misrepresentation" in the Town Court is now irrelevant.

Appellate Division, Second Department, seeking to prohibit prosecution of the indictment (J.A. 30). The Appellate Division dismissed the petition without opinion (Pet. at 1b). On appeal, the New York State Court of Appeals reversed the judgment of the Appellate Division, granted the petition, and prohibited further prosecution (Pet. at 16a).

The first five counts of the indictment were dismissed in reliance on this Court's dictum in *Illinois v. Vitale*, 447 U.S. 410, 421 (1980) (Pet. at 11a-12a). In addition, the second and third counts were held barred by the holding in *Blockburger v. United States*, 284 U.S. 299 (1932) (Pet. at 12a, n.7). The sixth and seventh counts of the indictment were dismissed on purely State law grounds (Pet. at 13a). Two judges dissented, but did not address the constitutional issues presented by this case (Pet. at 14a *et seq.*).

This Court granted the prosecution's petition for a writ of certiorari on November 6, 1989 (J.A. 36). Petitioner here challenges only the dismissal of the first, fourth and fifth counts of the indictment (Pet. Br., pp. 10, 11).

Summary of Argument

The prosecution seeks to reverse the determination made by the New York State Court of Appeals in this case only insofar as that Court dismissed the first (Manslaughter in the Second Degree), fourth (Criminally Negligent Homicide) and fifth (Assault in the Third Degree) counts of the indictment.

The test found in *Blockburger v. United States*, 284 U.S. 299, 304 (1932) is not the sole standard to be used to determine whether trial of these counts is barred by the previous plea of guilty of and sentence for driving while intoxicated and failure to keep right.

The *Blockburger* case supplies but one of several standards to be applied in determining whether the earlier plea and sentence precludes prosecution of these three counts under the Double Jeopardy Clause. Even though the three counts survive a *Blockburger*-based analysis, the Double Jeopardy Clause bars trial on these counts because the prosecution has revealed that it will rely on driving while intoxicated and failure to keep right to establish respondent's guilt, thus disposing of the Double Jeopardy claim in favor of respondent. *See Illinois v. Vitale*, 447 U.S. 410 (1980), at 421 (majority opinion), 426 (dissenting opinion).

Moreover, principles of collateral estoppel and *res judicata* are part of the Double Jeopardy Clause. *See Ashe v. Swenson*, 397 U.S. 436 (1970). The modern view of *res judicata* as a rule of claim preclusion bars the prosecution of the respondent.

Finally, this Court is urged to hold that the Double Jeopardy Clause limited the prosecution to one proceeding in which it asserted against respondent all the charges that grew out of the occurrence underlying the indictment. *Ashe v. Swenson, supra*, 397 U.S. at 453-454 (Brennan, J., concurring).

Upon the principles derived from *Vitale* and *Ashe*, the Double Jeopardy Clause bars further prosecution of respondent. Having declared its readiness to try respondent for driving while intoxicated and failure to keep right, and having allowed those charges to go to final disposition, the prosecution has no power to put respondent to trial on the first, fourth and fifth counts of the indictment.

ARGUMENT

The Double Jeopardy Clause was properly applied by the New York State Court of Appeals. Further prosecution is precluded.

A. The Specific Problem Presented.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb". "[T]he Double Jeopardy Clause protects against three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense. See, *e.g., North Carolina v. Pearce,* 395 US 711, 717." *United States v. Halper,* ___ U.S. ___, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487, 496 (1989).

This case raises for examination the second of these protections, and presents the troublesome question of what the term "same offence" means. Various answers are suggested by decisions of this Court, no one of them commanding unflinching acceptance or providing a satisfactory solution to the discrete problems presented by the myriad factual settings in which the question arises. The "deceptively plain" language of the Double Jeopardy Clause presents "subtle and complex" problems defying "facile or routine" application. *Crist v. Bretz,* 437 U.S. 28, 32 (1978); *United States v. DiFrancesco,* 449 U.S. 117, 127 (1980).

The antiquity of the guarantee against Double Jeopardy notwithstanding, considerable confusion still surrounds its import, and the fact that the term "same offence" means different things in different contexts merely compounds the confusion. The "meaning of the Double Jeopardy Clause is

not always readily apparent", *Tibbs v. Florida,* 457 U.S. 31, 47 (1982) (White, J., dissenting), and the guarantee is "one of the least understood", producing decisions "replete with *mea culpa's*", *Whalen v. United States,* 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

This case again forced a State court to wrestle with the Double Jeopardy questions created when an automobile accident spawns both misdemeanor or lower charges under local traffic laws (*e.g.,* New York Vehicle & Traffic Law §§ 1192[2], [3]; 1120 [a]) and later-asserted felony charges alleging the offender's responsibility for death or serious physical injury caused by the same accident.[4] A few of these cases have come for decision by this Court in the last decade.

In 1980, *Illinois v. Vitale,* 447 U.S. 410, held: " '[I]f manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the *Blockburger* [*v. United States,* 284 U.S. 299 (1932)] test. *The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.*' [*Illinois v. Vitale,* 447 U.S. 410] at 419 (emphasis supplied)." *Illinois v. Zegart,* 452 U.S. 948, 950 (1981) (Burger, C.J., dissenting from denial of certiorari). Dictum in the *Vitale* opinion suggested the problem that arose but evaded decision in two subsequent cases and which confronts this Court today: "[I]f in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident [the charge upon which Vitale had been tried and convicted] as the reckless act necessary to prove manslaughter, Vitale would have a *substantial* claim of double

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[4] *See, e.g., State v. Lonergan,* 213 Conn. 74, 566 A.2d 677 (1989) (collecting cases).

jeopardy." *Illinois v. Vitale, supra,* 447 U.S. at 421 (emphasis added). The dissent in *Vitale* enlarged on this dictum by observing that if the prosecution found it necessary to rely on Vitale's failure to reduce speed to make out its manslaughter case, Vitale's Double Jeopardy claim "would not only be 'substantial'; it would be dispositive." *Id.* at 426 (Stevens, J., dissenting).

In 1984, *Thigpen v. Roberts,* 468 U.S. 27, presented a similar double jeopardy question in a habeas corpus setting. The Fifth Circuit held that prosecution of Roberts was barred by the Double Jeopardy Clause because, under *Vitale,* "[t]he focus . . . is on the evidence actually presented at trial. . . . The same evidence that led to Robert's [*sic*] conviction on the misdemeanor charge was also introduced in the manslaughter trial. . . . Because Roberts has a substantial double jeopardy claim under the . . . holding in *Illinois v. Vitale,* the district court's granting of habeas corpus relief must be affirmed." Pet. for Cert., *Thigpen v. Roberts,* pp. A12-A13.[5] The accuracy of the Fifth Circuit's analysis of the impact of *Vitale* was not decided because this Court affirmed the result reached below on other grounds.[6]

And in 1985, *Fugate v. New Mexico,* 470 U.S. 904 (*reh. den.,* 471 U.S. 1112), affirmed, by an evenly divided Court, the State's rejection of Fugate's Double Jeopardy claim that his guilty plea and sentence on driving while intoxicated and careless driving barred his subsequent trial and conviction for homicide by vehicle. *See* summary of the oral argument in *Fugate,* 53 U.S.L.W. 3609-3610 (1985).

[5]The *per curiam* opinion of the Fifth Circuit in *Roberts v. Thigpen* was not published. *See* 693 F.2d 132 (1982). It was included as "Exhibit 4" (pp. A7-A13) in the Appendix to the Petition for a Writ of Certiorari in *Thigpen v. Roberts.* The above-quoted language is taken from that Appendix.

[6]Then Justice Rehnquist dissented and rejected the applicability of *Vitale's* dicta to Roberts' situation. 468 U.S. at 36-39.

B. *Blockburger* is Not the Sole Criterion.

The petitioner argues that in this case constitutional analysis should begin and end with the *Blockburger* test. The simple answer to the suggestion that *Blockburger* does it all was provided in *Brown v. Ohio,* 432 U.S. 161, 166-167, n.6 (1977):

> The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first.

We agree that the *Blockburger* test should not "be abandoned or expanded." (Pet. Br., p. 10). It should be kept where it belongs—as a useful tool for divining legislative intent and determining whether cumulative punishment is constitutionally permissible after conviction upon multiple counts in a single accusatory instrument. *See Jones v. Thomas,* ___ U.S. ___, 109 S.Ct. 2522, 105 L.Ed.2d 322 (1989), *reh. den.,* ___ U.S. ___, 110 S.Ct. 12, 106 L.Ed.2d627; *Missouri v. Hunter,* 459 U.S. 359 (1983); *State ex rel. Bulloch v. Seier,* 771 S.W.2d 71 (Mo. 1989), *cert. den. sub nom. Missouri v. Bulloch,* ___ U.S. ___, 58 U.S.L.W. 3421 (1990). *Blockburger* was formulated and has its proper application in a single trial, multiple punishment case. *Blockburger* should not be allowed to run amok and become the sole standard for determining the constitutionality of consecutive prosecutions generated by the

accused's conduct at a limited time, in a limited place and under limited factual circumstances.

Multiple punishment for the same offense is only one of the abuses against which the Double Jeopardy Clause guards. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Use of *Blockburger* to diminish the protection against another abuse—multiple prosecution by a single State—deprives the great constitutional protection of the Double Jeopardy Clause of much of its significance by giving it "a narrow, grudging application", *Green v. United States*, 355 U.S. 184, 198 (1957), reflected by an arid exercise in word-matching statutes, "a mere matter of formal pleading", *People v. Silverman*, 281 N.Y. 457, 462, 24 N.E.2d 124, 126 (1939), inimical to the injunction that Double Jeopardy principles are "not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). As one of the precious protections provided by the Bill of Rights, the Double Jeopardy Clause cannot be reduced to a mere matter of statutory construction unimpeded by the reality of the particular case.

The statement in *Green v. United States*, 355 U.S. 184, 187-188 (1957) has been frequently cited in the opinions of this Court:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The Double Jeopardy Clause "serves principally as a restraint on courts and prosecutors." *Brown v. Ohio, supra*, 432 U.S. at 165. "Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Tibbs v. Florida, supra*, 457 U.S. at 41. Allowing prosecution of Corbin on the indictment would be an open invitation to an overzealous prosecutor to use the trial of a traffic offense as a kind of dress rehearsal for a later murder or manslaughter trial. This cannot be. *Id.*[7]

The New York State Court of Appeals held that Vehicle & Traffic Law § 1800(d) takes precedence over the general statutory rules which would bar this prosecution. Pet. at 10a. That statute provides: "A conviction of violation of any provision of this chapter shall not be a bar to a prosecution for an assault or for a homicide committed by any person in operating a motor vehicle or motorcycle." Without § 1800(d), this case could have been disposed of below solely on State law grounds.

Vehicle & Traffic Law § 1800(d) would permit subsequent prosecutions even under circumstances violative of the *Blockburger* test. The petitioner here tacitly recognizes the facial infirmity of § 1800(d), by eschewing any claim that the second and third counts of the indictment may be prosecuted, even though § 1800(d) would, as written, clearly permit these counts to proceed to trial.

Section 1800(d) is apparently formed by the sentiment that citizens confronting traffic charges are somehow

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[7]The conviction of respondent before the LaGrange Town Court bars prosecution of the first, fourth and fifth counts in the indictment, New York Vehicle & Traffic Law § 1800(d) notwithstanding. To the extent that § 1800(d) might be construed to interfere with or abridge Corbin's right not to be twice placed in jeopardy, that statute "cannot constitutionally be applied" (Pet. at 12a).

excluded from the protection of the Double Jeopardy Clause. *See, e.g., People v. Jackson*, 118 Ill.2d 179, 514 N.E.2d 983, 988-989 (1987). *But see Illinois v. Vitale*, 447 U.S. 410 (1980). Expressing the sentiment shows its grotesqueness. As a practical matter, a vast number of Americans who face the criminal justice system face it in response to alleged violations of traffic laws. Often these charges carry the potential for incarceration. For example, Corbin's plea of guilty exposed him to the possibility of a one year jail term, in addition to a fine. Even the sanction of license revocation, superficially a small inconvenience, is magnified when imposed upon one living in largely rural Dutchess County, New York.

By effectively excluding traffic offenders from the fundamental protections embodied in the Double Jeopardy Clause, Vehicle & Traffic Law § 1800(d) undermines the principles of the Bill of Rights. The statute singles out traffic offenders and excepts them as a group of pariahs, to whom the State gives no protection and from whom the State would deserve sullen contempt. Once § 1800(d) is removed from consideration, the disposition of this case in Corbin's favor would rest entirely on State law grounds, saving resolution of the reach of the Double Jeopardy Clause for another, more appropriate case.

C. *Vitale* Precludes Subsequent Prosecution Based on the Same Evidence.

Constitutional Double Jeopardy analysis properly begins with the *Blockburger* test; it does not end there. The standards suggested by this Court in *Illinois v. Vitale*, 447 U.S. 410 (1980) and the principles underlying the Double Jeopardy Clause prohibit trial of the indictment in this case.

Employing a two-tiered analysis inspired by *Vitale* aptly demonstrates Corbin's "substantial" Double Jeopardy claim. Vitale, like Corbin, was involved in an automobile accident that resulted in death. After Vitale was convicted for failing to reduce speed, a traffic offense, the State attempted to prosecute him for manslaughter. The Illinois Supreme Court held that the two offenses were the same for Double Jeopardy purposes, *see* 447 U.S. at 414-415. This Court reiterated the principle that "the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial," *id.* at 416, and held: "The *mere possibility* that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution." *Id.* at 419 (emphasis added).

Vitale did not end the inquiry there. It went on to note that "it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*, 433 U.S. 682 (1977) . . . [I]f in the pending manslaughter prosecution Illinois relies on and proves a failure to slow . . . as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy. . . ." 447 U.S. at 419-420, 421 (footnotes omitted). The dissent opined that if the prosecution found it necessary to rely upon the "failure to reduce speed in order to sustain its manslaughter case", Vitale's Double Jeopardy claim "would not merely be 'substantial'; it would be dispositive." *Id.* at 426 (Stevens, J., dissenting).

The "pointed dictum" in *Vitale* was held to have "direct application" in this case by the New York State Court of Appeals (*see* Pet. at 11a). The uncertainty about the nature of the State's evidence in *Vitale* sprang from the fact that the State had somehow managed to avoid revealing the basis of its manslaughter prosecution. *See* 447 U.S. at 426. The reason for remanding *Vitale* was the need to ascertain the facts underlying the indictment "because the reckless act or acts the State will rely on to prove manslaughter are still unknown. . . ." *Id.* at 421.[8] Here, the prosecutor has revealed—before trial—that this second prosecution necessarily requires evidence of the same conduct underlying the offenses for which Corbin has already been convicted. Factual identity is shown by the prosecution's Bill of Particulars (J.A. 20-21):

> Based upon the foregoing, it is apparent that the defendant operated a motor vehicle on a public highway in an intoxicated condition having more than .10 percent of alcohol content in his blood, that he failed to keep right and in fact crossed nine feet over the median of the highway while driving at approximately forty-five to fifty miles an hour. . . . By so operating his vehicle in the manner above described, the defendant was aware of and consciously disregarded a substantial and unjustifiable risk. . . . By his failure to perceive this risk while

[8]The suggestion "that *Vitale* mandated a strict application of *Blockburger* is refuted by the fact that the *Vitale* court remanded the case for further factual clarification regarding what the state's proof was to be in the subsequent trial. If . . . only a *Blockburger* comparison of the statutory elements was prescribed by *Vitale*, then it would have made no difference what the state's proof would have been in the subsequent trial." *State v. Lonergan*, 213 Conn. 74, 88, 566 A.2d 677, 684 (1989); *see* Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 Iowa L. Rev. 323, 352 (1986).

> operating a vehicle in a criminally negligent and reckless manner, he caused physical injury to Daniel Dirago and the death of his wife, Brenda Dirago.

The prosecution's Bill of Particulars (J.A. 18-21) thus supplies the very specificity lacking in *Vitale*. As held by the New York State Court of Appeals: "Although [reckless manslaughter, criminally negligent homicide and third degree reckless assault] are clearly not the 'same offenses' as the traffic offenses to which [Corbin] previously pleaded guilty . . . the prosecution here has affirmatively stated in its bill of particulars that it intends to use the acts underlying the latter offenses as the major part of its proof on the reckless and negligence elements of the former crimes. This statement of the prosecution's theory became a part of its pleadings and, until amended, was binding on the People. . . . Thus, unlike [*Vitale*], there is no need in this case to await the trial to ascertain whether the prosecution will rely on the prior traffic offenses as the acts necessary to prove the homicide and assault charges. The 'substantial' double jeopardy problem identified in *Vitale* is apparent on the face of the People's pleadings here." (Pet. at 11a-12a; citations omitted).[9]

Contrary to the prosecution's assertion, reliance upon *Vitale* does not "abandon or expand" the *Blockburger* test (*see* Pet. Br. at 10). As *Vitale* shows, *Blockburger* is "the

[9]If one were to remove driving while intoxicated and failure to keep right from the bill of particulars, all one has left is the allegation that the accident occurred while Corbin was "driving at approximately forty-five to fifty miles an hour." As a matter of New York law this lone fact would not support a conviction. To illustrate: in *People v. Perry*, 123 A.D.2d 492, 507 N.Y.S.2d 90 (4th Dep't 1986), *affd. for the reasons below*, 70 N.Y.2d 626, 512 N.E.2d 540, 518 N.Y.S.2d 957 (1987), the fatal accident occurred when Perry was driving at 80 miles per hour, on a country road on a dark night. The intermediate appellate court reversed the judgment convicting Perry of criminally negligent homicide (New York Penal Law § 125.10) holding that this evidence was insufficient to constitute criminal negligence.

principal test for determining whether two offenses are the same for purposes of barring successive prosecutions." 447 U.S. at 416. However, it has never been held to be the *exclusive* standard employed in Double Jeopardy analysis.[10]

As suggested in *Vitale*, and reflected in the decision of the New York State Court of Appeals in this case, *Blockburger* constitutes the first hurdle to be overcome in successive prosecution cases. If the offenses are the "same" under *Blockburger*, further prosecution is precluded. If the prosecution survives the *Blockburger* test, the inquiry *proceeds* to determine whether the evidence to be relied on by the prosecution in the subsequent indictment is essentially the same as that underlying the prior conviction.

"In short, the court in *Vitale* indicated that there are two ways of detecting double jeopardy violations in successive prosecution cases. First, the *Blockburger* test may categorize the two offenses as being the same. Second, an examination of the evidence may be undertaken to determine if the second offense requires proof that was already offered to prove the first offense." *State v. Lonergan*, 213 Conn. 74, 84, 566 A.2d 677, 682 (1989); *see* Thomas, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 Iowa L. Rev. 323, 350-352 (1986).

"[I]t seems far more preferable to adjudicate all criminal liability for a single course of conduct in one proceeding, even if multiple convictions result, than to allow the government to bring a series of trials based on that conduct. In a single proceeding, the worst that can happen is the court will impose additional punishment. If a series of trials develops, however, the repeated litigation becomes a punishment in itself irrespective of the ultimate outcome." Thomas, *The Prohibition of Successive Prosecutions, supra*, at 342. As this Court has long recognized, it is "very clear that where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *In re Nielson*, 131 U.S. 176, 188 (1889).

"Thus, '[g]iven the multiplicity of offenses that may arise from a single criminal transaction, the formalistic *Blockburger* test, with its narrow focus on the technical elements of the offenses charged, is inadequate to vindicate this constitutional guarantee against retrial. The general test for determining whether successive prosecutions involve the "same offense" is therefore a more flexible and pragmatic one, which focuses not on the formal elements of the two offenses but rather on the proof actually utilized to establish them.'" *State v. Lonergan, supra*, 213 Conn. at 91, 566 A.2d at 686, quoting *United States v. Ragins*, 840 F.2d 1184, 1188 (4th Cir. 1988).

The prosecution in this case violates the protection afforded by the Double Jeopardy Clause by subjecting Corbin to multiple prosecutions for the same conduct.

D. Further Prosecution is Barred by the "Claim Preclusion" Aspect of the Double Jeopardy Clause.

The related principles of *res judicata* and collateral estoppel are an integral part of the Double Jeopardy Clause. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970); *Turner v. Arkansas*, 407 U.S. 366, 368 (1972); *Dowling v. United*

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[10]The *Blockburger* test "is not talismanic," *State v. Lonergan, supra* n. 8, 213 Conn. at 88 n. 5, 566 A.2d at 684 n. 5, but rather a rule of statutory construction, to be employed in what is "essentially a factual inquiry as to legislative intent [rather than] a conclusive presumption of law." *Garrett v. United States*, 471 U.S. 773, 779 (1985), *reh. den.*, 473 U.S. 927; *see Whalen v. United States*, 445 U.S. 684, 708 (1980) (Rehnquist, J., dissenting).

States, ___ U.S. ___, 58 U.S.L.W. 4124 (decided 1/10/90). "A primary purpose served by [the Double Jeopardy Clause] is akin to that served by the doctrines of *res judicata* and collateral estoppel—to preserve the finality of judgments." *Crist v. Bretz*, 437 U.S. 28, 33 (1978) (footnote omitted). The Double Jeopardy Clause promotes finality regardless of the outcome of the first prosecution, *Brown v. Ohio*, 432 U.S. 161, 165-166 (1977). Finality is assured by barring "relitigation between the same parties of issues actually determined at a previous trial", *Ashe v. Swenson*, *supra*, 397 U.S. at 442. The Double Jeopardy Clause serves "a constitutional policy of finality for the defendant's benefit" when successive prosecutions are brought, *United States v. Jorn*, 400 U.S. 470, 479 (1971).

Over a half century before the decision in *Ashe*, Justice Holmes said: "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. . . . [T]he Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice. . . ." *United States v. Oppenheimer*, 242 U.S. 85, 87; 88 (1916).

This "fundamental principle of justice" employs two concepts: "issue preclusion" (collateral estoppel) and "claim preclusion" (*res judicata*). Restatement (Second) of Judgments (1982), § 18 provides that a successful "plaintiff cannot . . . maintain an action on the original claim or any part thereof. . . ." Section 24 of the Restatement (Second) defines the scope of the doctrine of claim preclusion:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Because the Double Jeopardy Clause reflects a "willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws", *United States v. Jorn*, *supra*, 400 U.S. at 479, and if "a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense", *United States v. Wilson*, 420 U.S. 332, 343 (1975), then the result reached by the New York State Court of Appeals in this case was correct and Corbin may not be further prosecuted.

One may object to the foregoing analysis because the prosecutorial arm of the State fell asleep in this case, and the prosecution-barring adjudication rested on a plea, not on a judgment after trial. The judgment here should be given preclusive effect because "a guilty plea is equivalent to a conviction after trial for issue preclusion purposes", *Merchants Mutual Ins. Co. v. Arzillo*, 98 A.D.2d 495, 504, 472 N.Y.S.2d 97, 103 (2d Dep't 1984) (collecting cases). Even the common law "forbid a second trial for the same offense, whether the accused had suffered punishment or

not, and whether in the former trial he had been acquitted or convicted", *Ex Parte Lange*, 18 Wall. 163, 169 (1874).

No decision implementing the protections provided by the Double Jeopardy Clause should excuse, condone or encourage "a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time." *Brock v. North Carolina*, 344 U.S. 424, 429 (1953) (Frankfurter, J., concurring). *Sole* responsibility for creating the problem in this case rests upon specific members of the staff of the District Attorney.

New York law clearly defines the prophylactic step that could and should have been taken by the prosecution in this case. Criminal Procedure Law § 170.20(2) permits the prosecution to apply for an adjournment of the proceedings in the local criminal court upon the ground that the prosecution intends to present the charges in question to a grand jury. Section 170.20(2) goes on to provide that once invoked by the prosecutor, "the local criminal court *must* adjourn the proceedings to a date which affords the district attorney reasonable opportunity to pursue such action, and may subsequently grant further adjournments for that purpose as are reasonable under the circumstances." (Emphasis added.) "This record represents another example of an unfortunate lapse in orderly prosecutorial procedures, in part, no doubt, because of the enormous increase in the workload of the often understaffed prosecutor's offices. The heavy workload may well explain these episodes, but it does not excuse them.... The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done. That the breach ... was inadvertent does not lessen its impact." *Santobello v. New York*, 404 U.S. 257, 260, 262 (1971).

In this case, the prosecution did not meet its burden of "letting the left hand know what the right hand is doing." Even more importantly, this case shows not only a lack of continuity between the various assistant district attorneys, but a seeming nonchalance about the fatality involved. ADA Dolan, the supervisor of ADAs Chase, Glick and Sauter (T. 205), was at the scene of the accident on the night of October 3, 1987 and chose not to press charges against Corbin other than those for driving while intoxicated and failure to keep right; he was, by his own testimony, informed that same evening of the death of Mrs. Dirago (T. 207). When questioned about what he did at this point, ADA Dolan replied, simply, "Nothing." (T. 207). The prosecution dawdled over three months after the accident and approximately two months after the guilty plea before indicting Corbin on charges arising out of the same criminal episode.

Recognizing that the Double Jeopardy Clause protects Corbin would promote the desired end of assuring finality of the judgment and facilitate the administration of criminal justice by compelling law enforcement agents to be aware of their duty to coordinate their activities so that issues determined in apparently minor cases do not prevent prosecution of more serious offenses.

We also suggest that this Court reconsider its steadfast refusal, *see Garrett v. United States*, 471 U.S. 773, 790 (1985), *reh. den.*, 473 U.S. 927, and adopt Mr. Justice Brennan's view stated in concurrence in *Ashe*: "[T]he Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. This 'same transaction' test of 'same offense' not only enforces the ancient prohibition against vexatious multiple prosecutions

embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience." 397 U.S. at 453-454 (footnote omitted).

This "same transaction" test complements *Blockburger*, *Vitale* and *Ashe*, and serves to stabilize Double Jeopardy jurisprudence without placing any greater burden on prosecutors than the ancient duty to pay attention to what they are doing.

CONCLUSION

The essential purposes of the Double Jeopardy Clause were served in this case. The judgment of the New York State Court of Appeals should be affirmed.

Respectfully submitted,

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No. 89-474

IN THE

Supreme Court of the United States

October Term, 1989

WILLIAM V. GRADY, DISTRICT ATTORNEY OF DUTCHESS COUNTY,

Petitioner,

vs.

THOMAS J. CORBIN,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

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ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY BRIEF FOR PETITIONER

Statement of the Case

At Pages 2 through 10 of the Petitioner's Brief, Petitioner sought to give a summary of the case beginning with the automobile collisions which ultimately resulted in death and physical injury and indicating the course of events which brought this matter before this court.

In the Respondent's brief, at Pages 2 through 7, he, too, sets forth a statement of facts. At Page 5, referring to J.A. 12, he states that the Assistant District Attorney, who was present on November 17, 1987, for Petitioner's sentencing on the Driving While Intoxicated and Failure to Keep Right charge recommended that the court impose the minimum sentence. The Petitioner does not believe that the local criminal court notes of the sentencing proceeding support that claim.

> 11/17/87 Thomas Corbin was present with his Attorney, Mark Reisman, before Judge Caplicki and ADA Heidi Sauter.
>
> Atty: My Client is willing to plead guilty and I request minimum sentence.
>
> Judge: Read charges. We will accept your plea of guilty. Any recommendation on sentence?
>
> Atty: Minimum sentence.
>
> Judge: The fine will be $350.00 and $10.00 surcharge. Your license will be revoked for six months and you will be given a twenty-day license. You can also attend the Article 21 School if you are eligible and must successfully complete the course.
>
> J.A.12

It appears from the court's notes that the recommendation of the minimum sentence was made by the defendant's attorney rather than the prosecutor.

ARGUMENT

Respondent's prosecution for manslaughter, criminally negligent homicide and assault should proceed

Respondent essentially concedes that the test derived from *Blockburger vs. United States,* 284 U.S. 299 (1932), would not bar his prosecution for manslaughter, criminally negligent homicide, and assault on Counts One, Four and Five of the Indictment, notwithstanding his guilty plea to Driving While Intoxicated and Failure to Keep Right. As we have explained, because the statutory elements of the two Vehicle and Traffic offenses include elements not included in the statutory definition of the crimes charged in Counts One, Four and Five, prosecution for these three counts would not be barred as prosecution for the "same offense" under *Blockburger. See* Brief for Petitioner at Pages 13-15. Nothing in Respondent's brief casts doubt on this conclusion.

Having conceded that the *Blockburger* analysis focuses on the statutory elements of the offense, and that the counts at issue here are not the "same offense" under *Blockburger,* as the traffic ticket offenses to which he pled guilty, Respondent advances three arguments. First, he argues that *Blockburger* is insufficient to determine whether two offense are the same for purposes of successive prosecutions, and that the *Blockburger* test should, therefore, be used only in multiple punishment cases. *See* Brief for Respondent at Pages 13-14. Second, he argues that dictum in *Illinois vs. Vitale,* 447 U.S. 410 (1980), should be taken to establish a new rule barring the use at a successive trial of evidence that the defendant was guilty of earlier offense to which he pled guilty. Brief for Respondent at Page 21. Third, he argues that some form of *res judicata* principle bars prosecution on the counts at issue in this case. Brief for Respondent at Pages 21-26. None of these arguments is persuasive.

Although Respondent would prefer that what has become as the *Blockburger* test be confined to the multiple punishment context, the test originated in a successive prosecution case, see *Morey v. Commonwealth*, 108 Mass. 433 (1871), and has been repeatedly applied in the successive prosecution context. See, *e.g., Illinois vs. Vitale*, 447 U.S. 410 (1980); *Brown v. Ohio*, 432 U.S. 161 (1977); *Gavieres v. United States*, 220 U.S. 338 (1911). The *Blockburger* test provides relatively determinate answers to the question of whether two offenses as defined by their statutory elements are "the same" for Constitutional purposes, and strikes an appropriate balance between the competing values of repose embodied in the double jeopardy clause and society's need to prosecute those who violate the criminal law.

Illinois v. Vitale, 447 U.S. 410 (1980), should not be read to have created an additional hurdle—over and above the *Blockburger* test—that must be overcome before prosecuting a defendant for a crime where the evidence of such crime is related to evidence used in a preceding prosecution. The language from *Vitale* upon which the Respondent relies was plainly dictum; although, suggesting that the use of the same evidence in the second prosecution would create a "substantial" double jeopardy claim, (447 U.S. at 420-21), this Court did not rule that the second prosecution would in fact violate the double jeopardy clause.

To hold that this Court in a few sentences at the conclusion of the *Vitale* opinion intended to create a far reaching extension of the Constitutional bar to re-prosecution would render inexplicable the balance of the *Vitale* opinion, as well as other cases in which this court has addressed the same issue. As the *Vitale* Court noted:

> The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the "same" under the *Blockburger* test. The mere possibility that the state will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.

447 U.S. at 419. See, *e.g., Brown v. Ohio, supra*, 432 U.S. at 166, ("The test to be applied is whether *each provision* requires proof of a fact which the other does not.") (emphasis added), *Ianelli v. United States*, 420 U.S. 770, 785 n.17 (1975) ("If each [statute] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, not withstanding a substantial overlap in the proof offered to establish the crimes."). This court's emphasis in *Vitale* and elsewhere on the statutory elements of the crime would have been futile if the critical inquiry involved the actual evidence which the state intended to—or actually did—introduce at the second trial. Indeed, the adoption of this "actual evidence" test would render further use of *Blockburger*, in the successive prosecution context, superfluous. Under that standard, every prosecution that would be barred under *Blockburger* would be presumably barred by this "actual evidence" test.

In addition, adopting Respondent's test would substantially complicate double jeopardy analysis of successive prosecution cases. In many cases, it would not be possible until after the second trial was completed to determine the extent to which the evidence at the two trials overlapped. Thus, the question as to whether the second trial was barred would often have to be postponed until after the second trial was concluded. This would cause a particularly inapt result in applying a right which is intended to protect the defendant against burdens of undergoing a second trial. *See Abney v. United States*, 431 U.S. 651 (1977). Nowhere does Respondent explain the scope of the bar that would be created by his test. Would it extend to any evidence that was

in fact introduced at both trials? Would it extend to evidence that, although perhaps circumstantial, turned out to be essential to prove the state's case at both trials? Would it extend to evidence that was direct evidence of an element of the second prosecution, but was merely cumulative as to that element? How would it be determined precisely what evidence was precluded by a guilty plea, rather than a trial, on the first charge. To adopt the Respondent's position would unnecessarily create a fruitful spawning ground for future litigation.

Respondent's suggestion that principles of *res judicata* or claim preclusion would bar his prosecution is another manifestation of Respondent's argument that the Court should adopt a "same transaction" test to determine the applicability of the double jeopardy clause in successive prosecution cases. *See* Brief for Respondent at Pages 21-26. Section 24 of the Restatement (Second) Of Judgments on which Respondent relies expressly would extinguish "all rights of [the state] to remedies against the defendant with respect to all or any part of the transaction or series of connected transactions out of which the action arose." (Emphasis added.) *See* Brief for Respondent at Pages 22-23. Although this test is commonly used in civil cases and has repeatedly been advanced by Justice Brennan in a number of contexts (*see, e.g., Ash v. Swenson*, 397 U.S. 436, 453-54 [1970]) (Brennan, J. , concurring), the court has repeatedly rejected the suggestion that it is constitutionally mandated by the double jeopardy clause in criminal cases. *See Garrett v. United States*, 471 U.S. 773, 790 (1985). Respondent advances no hitherto ignored reason why the court should now revisit this issue.

Respondent urges that the problem in this case was caused by prosecutorial error. Brief for Respondent at Pages 24-26. We believe and argued vigorously, although unsuccessfully (*see* Pet. App. 7a-9a), to the contrary, that the bar to further prosecution in this case arose because

Respondent actively took advantage of the system to mislead the local criminal court judge into accepting his guilty plea, thus creating the double jeopardy problem. Regardless of what may have occurred in the town court in this case, the rule of law which Petitioner advocates in no way depends on a conclusion that the prosecutor erred—or that the defendant did not.

The bar to further prosecution advocated by Petitioner would arise in future cases of this kind, regardless of whether the prosecution could have prevented the defendant from pleading guilty. For example, under New York Law, where a defendant is charged with a Vehicle and Traffic violation, he or she may plead guilty to a traffic violation by simply completing the declaration on the reverse side of the traffic ticket and mailing it to the court with his motor vehicle record of conviction. (New York Criminal Procedure Law Section 170.10, Subdivision 1[a]; New York Vehicle and Traffic Law Section 1805.) In such case, the existence of the traffic ticket may never be known to the prosecutor. However, if the conduct for which the defendant received the traffic ticket was criminally negligence, or reckless, and, in fact, caused death or serious injury, the defendant who took advantage of this technique would apparently, under Respondent's construction of the double jeopardy clause, be able to insulate himself from all further criminal liability. This result would conflict with the principle that the double jeopardy clause does not exist to provide an unjustified windfall. *Jones v. Thomas*, U.S. , 109 S.Ct. 2522, 105 L.Ed.2d 322, 355 (1989).

It is our position that two offenses are not "the same" for purposes of the double jeopardy clause if under the *Blockburger* test the statutory elements of each are not necessarily included within the elements of the other. See Brief for Petitioner at 19 and n.5. This court has never applied a "same evidence" test to bar a second trial on the grounds of

double jeopardy. To craft a new judicial rule instituting such test would invite endless litigation concerning the relationship between two prosecutions, the facts that would be necessary to prove them and the facts that the prosecution actually chose to adduce at trial. Since the Respondent has failed to advance any substantial reason why such rule of law is required, Respondent's arguments should be rejected.

Conclusion

The decision of the New York State Court of Appeals in the case at bar is an erroneous application of the Fifth Amendment Double Jeopardy Clause. The New York State Court of Appeals expansive ruling grants the Respondent enhanced protection which is not warranted by this Court's previous rulings and Respondent's prosecution for Manslaughter, Criminally Negligent Homicide and Assault should proceed.

For all the foregoing reasons, we ask this Court to reverse the decision of the New York State Court of Appeals and remand the case for further appropriate proceedings.

Respectfully submitted,

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